

To: (b) (6) (b) (6)
From: Allen, Joseph J.
Sent: Fri 10/6/2017 10:23:29 PM
Subject: RE: WSJ question on registering machine guns and bump stock determination

(b) (6) I thought we were answering the question about ATF's position on when a device is classified as a machinegun conversion device (which underlies the second question).

EPS was to provide data on the question regarding increase in registrations.

I would clarify that response was not intended to answer the first part of the question. Do you have an answer from EPS yet?

--Joe

From: (b) (6)
Sent: Friday, October 6, 2017 5:45 PM
To: Allen, Joseph J. (b) (6)
Subject: WSJ question on registering machine guns and bump stock determination

Hi Joe,

The reporter had the below follow up question about the answer that you crafted in my office: "I'm not sure I understand your response to the first question. I think I'm missing something. How does this explain the increase in the number of registered machineguns?"

Here's the question and answer he's referring to:

Q: What explains the increase in registered machine guns? Has the ATF veered at all from its 2010 determination that bump stocks are firearm parts and not regulated by the GCA or the NFA?

A: In Dec 2006, ATF publicly published Ruling 2006-2. This ruling described criteria for classification of devices that are "designed and intended solely and exclusively or a combination of parts designed and intended, for use in converting a weapon into a machinegun."

(b) (6)

To: Turk, Ronald B. (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 10:56:07 PM
Subject: Analysis
Counsel Memo to OAG re 'Bump Fire' Stocks 10-5-17.docx
ATT00001.txt

Ron, This is the analysis we sent for OLC review.

Will call.

Joe



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of Chief Counsel

Washington, DC 20226

www.atf.gov

October 5, 2017

200000(b) (6)

MEMORANDUM TO: Office of the Attorney General
United States Department of Justice

FROM: Chief Counsel
Bureau of Alcohol, Tobacco, Firearms and Explosives

(b) (5)

PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

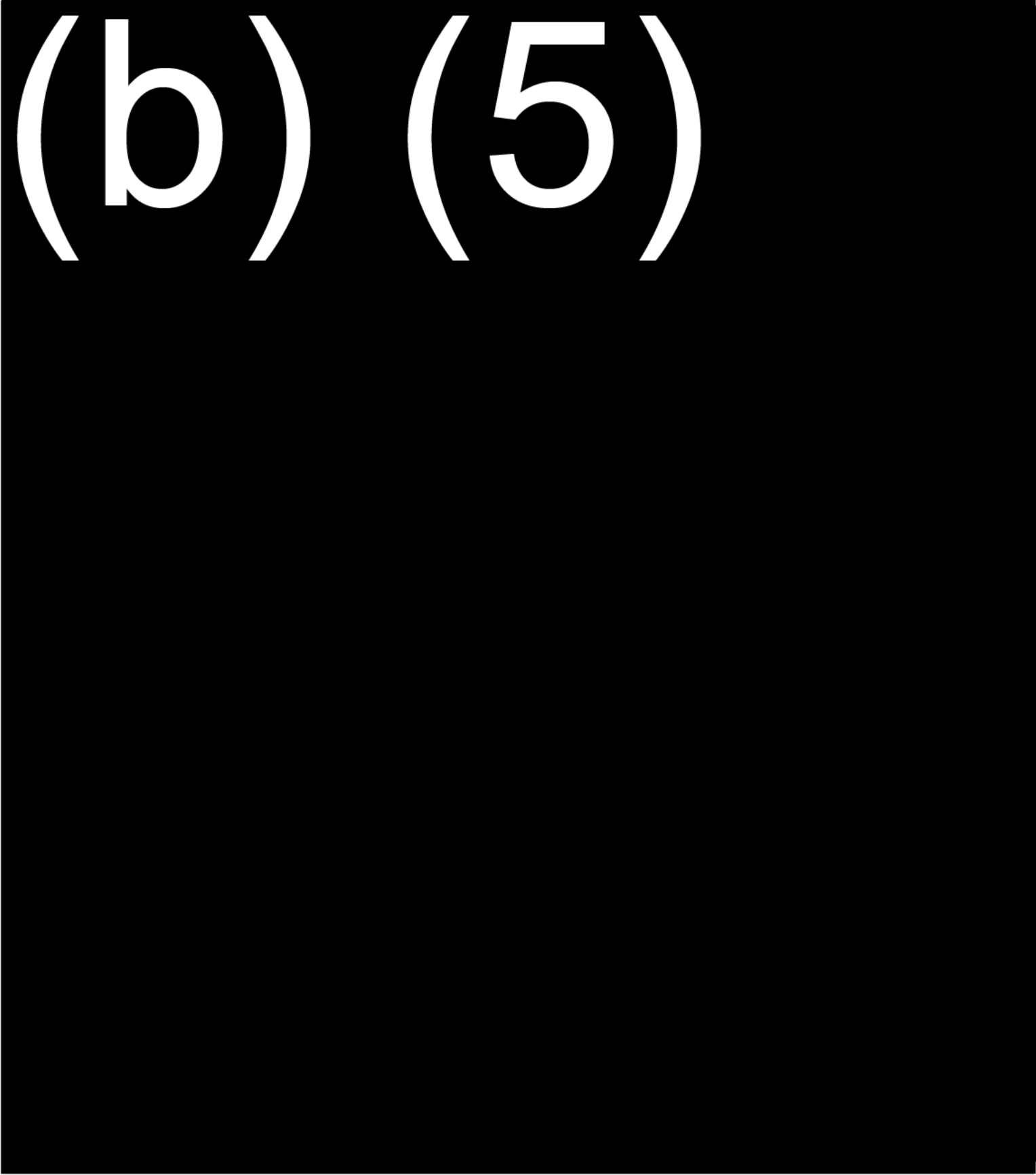
Office of the Attorney General

(b) (5)

PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

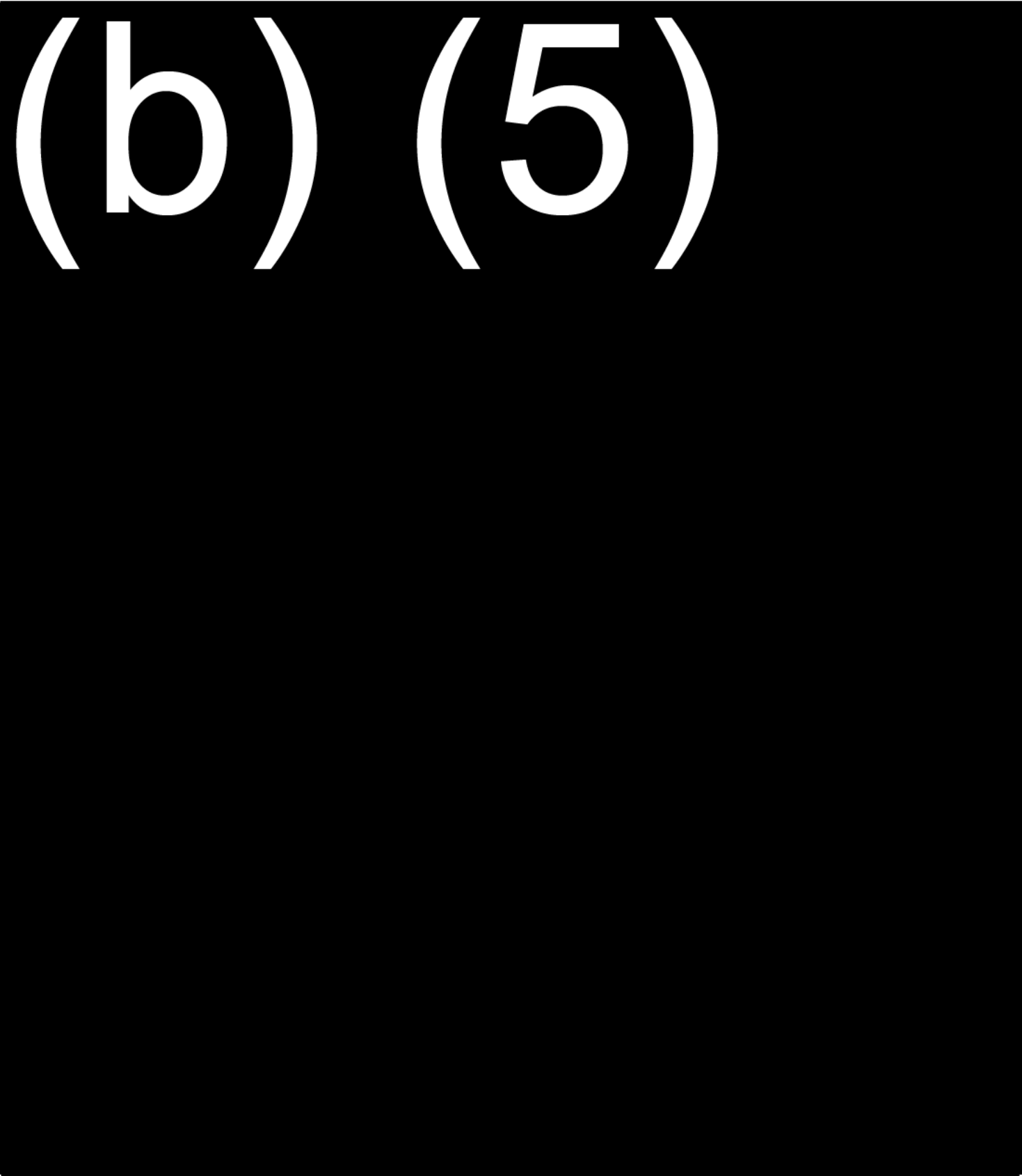
(b) (5)



PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

(b) (5)



PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

Charles R. Gross

To: (b) (6) (b) (6)
Cc: Shaefer, Christopher C. (b) (6) Bennett, Megan A. (b) (6)
From: Allen, Joseph J.
Sent: Fri 10/6/2017 5:58:04 PM
Subject: Re: Hearst Media

Thank you.

On Oct 6, 2017, at 1:54 PM (b) (6) <(b) (6)> wrote:

Below is what I found from Hearst Media, published early January 2013- the link to the story is: <http://www.ctpost.com/local/article/Machine-gun-like-device-part-of-ban-4237269.php>

WASHINGTON -- For gun enthusiasts, the Slide Stock is an exciting add-on that enables shooters to unleash bursts of machine-gun-like fire from semiautomatic weapons like the AR-15.

Online videos show exultant gun owners spraying targets, including ones depicting zombies, with what appears to be fully automatic fire at rates of 400 rounds per minute or better.

On its website, the Slide Stock's manufacturer, [Slide Fire Solutions Inc.](#), of Moran, Texas, tells its prospective customers: "Prepare to change the way you play." (Of the zombies, their refrain is: "Prepare. They won't kill themselves.")

For Slide Fire Solutions, the sweetest part may be the [Bureau of Alcohol, Tobacco, Firearms and Explosives](#) in 2010 said the Slide Stock is perfectly legal under law.

But for gun control advocates, including Sen. [Dianne Feinstein](#), D-Calif., bumpfire devices -- as they're known generically -- are a nightmare waiting to happen.

"With practice, a shooter can control his rate of fire from 400 to 800 rounds per minute," Feinstein said Wednesday, speaking at a [Senate Judiciary Committee](#) hearing on guns. With such devices, she said, mass shooters gain "tremendous killing power" that can "tear young bodies apart."

Back to Gallery

Along with other Democratic lawmakers, Feinstein introduced an updated assault weapons ban last week in response to the Newtown, Conn., shootings at [Sandy Hook Elementary School](#). In addition to 157 named assault weapons, Feinstein's measure specifically outlaws bump-fire stocks.

"Fully automatic weapons are illegal, and I strongly believe that devices allowing shooters to fire at similar rates should also be outlawed," Feinstein said.

For [Steve Sposato](#), of Lafayette, Calif., such devices are a nightmare that did, in fact, happen.

[Gian Luigi Ferri](#) used an earlier incarnation of bump-fire, the Hellfire trigger, on the Tec-9 semiautomatic pistols he fired during the July 1, 1993, shooting rampage at 101 California St. in San Francisco. Among the eight people murdered that day was Sposato's wife, [Jody Jones-Sposato](#).

"These devices have no purpose at all in our society, period, end of story," Sposato said.

"People think it's fun, but people think it's fun to throw grenades, and they're illegal. Trade-offs have to be made."

Sposato called manufacturers of these products "dirtbags out to make a buck, and they don't care who gets hurt."

Gun enthusiasts offer rave reviews, but warn bumpfire can be an expensive habit.

"Fun? Yes indeed, the Slide Fire Stock is uber fun," said [David Fortier](#), writing in [Shotgun News](#) in September. "It will put a smile on your face just as quick as it empties your wallet as you burn through copious amounts of ammunition."

[David Koresh](#), the [Branch Davidian](#) cult leader in Waco, Texas, told law enforcement authorities that he used Hellfire triggers on semi-automatic weapons, according to "No More Wacos," a 1995 book by gun-rights advocate [David Kopel](#). Koresh and his followers killed four ATF agents during a 1993 raid before setting their compound ablaze during a subsequent FBI assault. At least 74 people died, including 25 children.

Gun manufacturers and users alike have long been fascinated with machine guns, which turned traditional warfare on its head when used to devastating effect in World War I. Prohibition-era gangsters' use of the "Tommy gun," which shot 875 rounds a minute or more, prompted Congress in 1934 to pass the National Firearms Act placing stiff federal registration and taxation requirements on machine gun possession.

Although the technology has been around for 40 years or more, bump-fire devices gained popularity in the wake of the Firearms Owners Protection Act, which among other things outlawed civilian possession or transfer of machine guns not legally in circulation prior to the law's signing date on May 19, 1986.

Firearms entrepreneurs have played a cat-and-mouse game with ATF regulators, attempting to engineer devices that enable semiautomatic weapons to replicate fully automatic ones while staying inside the legal distinction that divides them: A single trigger pull for each shot (semiautomatic) versus a continuous burst of shots "without manual reloading, by a single function of the trigger" (machine gun).

Although not required to do so under federal law, the ATF's [Firearms Technology Branch](#) in Martinsburg, W.Va., reviews any submitted device and determines on what side of the line it fall.

"We don't take a position on whether we like an item or don't like an item," said ATF senior firearms enforcement officer [Max Kingery](#). "We simply classify it according to the law."

A Marine Corps veteran, Kingery test-fires guns with each device installed. For the device makers, his decision can make the difference between commercial success and failure. ATF officials did not provide exact numbers on how many devices have been submitted for classification. Kingery said that in seven years he's reviewed approximately 10 to 12 such items.

Traditional bumpfire devices required a rifle be held at waist level, making the weapon difficult to shoot accurately, if the shooter could get it to work at all, Internet reviewers say.

By contrast, Slidefire Solutions' Slide Stock is held at shoulder level. Its flexible bridge between stock and mainframe essentially harnesses the weapon's recoil power to keep it firing round after round.

Instead of pulling the trigger for each shot, shooters pull back with their trigger finger and forward with their free hand. If done with the proper push-and-pull, the weapon

convulses into a paroxysm of fire.

Kingery compared it to stretching a rubber band. To some, distinctions between fully automatic machine guns and bumpfire-equipped semiautomatics may seem metaphysical at best.

In online videos, including a promotional one on Slidefire Solutions' own website, gun frames gyrate back and forth against the Slide Stock as users fire continuous bursts with little or no effort beyond a single trigger pull.

But Kingery insisted the appearances are deceiving. "It's not just one motion," he said. "It might appear to be shooting automatically, but it's actually not."

Slidefire Solutions put ATF's 2010 approval letter on its website. Online reviewers routinely urge buyers to print out this and other such letters and show them to police who question their weapons' legality. Slidefire Solutions did not respond to requests for comment.

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(b) (6)

Staff Assistant

Office of Public and Governmental Affairs

☎: (b) (6)

🌐: (b) (6) www.ATF.gov

<image001.jpg>

To: Shaefer, Christopher C. (b) (6)
Cc: Bennett, Megan A. (b) (6)
From: Allen, Joseph J.
Sent: Fri 10/6/2017 10:13:29 AM
Subject: Re: Unanswered questions from reporters regarding Lost Vegas Shooting

Chris, Let's discuss this morning. Not sure I understand how some of the answers will be delivered. We should be providing the process answers -- without specific tie-in to the investigation.

Thanks, Joe

Thank you, Joe

On Oct 5, 2017, at 10:05 PM, Shaefer, Christopher C. (b) (6) wrote:

Meg and Joe - short of erasing all bullets under bump stock - only reflecting we have no comment as DOJ will provide additional information. I'm good with the other TPs for PAD.

Joe - concur or additional caveat?

Regards,

Christopher Shaefer | Assistant Director

Public and Governmental Affairs | O: (b) (6) C: (b) (6)

On Oct 5, 2017, at 9:55 PM, Bennett, Megan A. <(b) (6)> wrote:

Hi Chris and Joe,

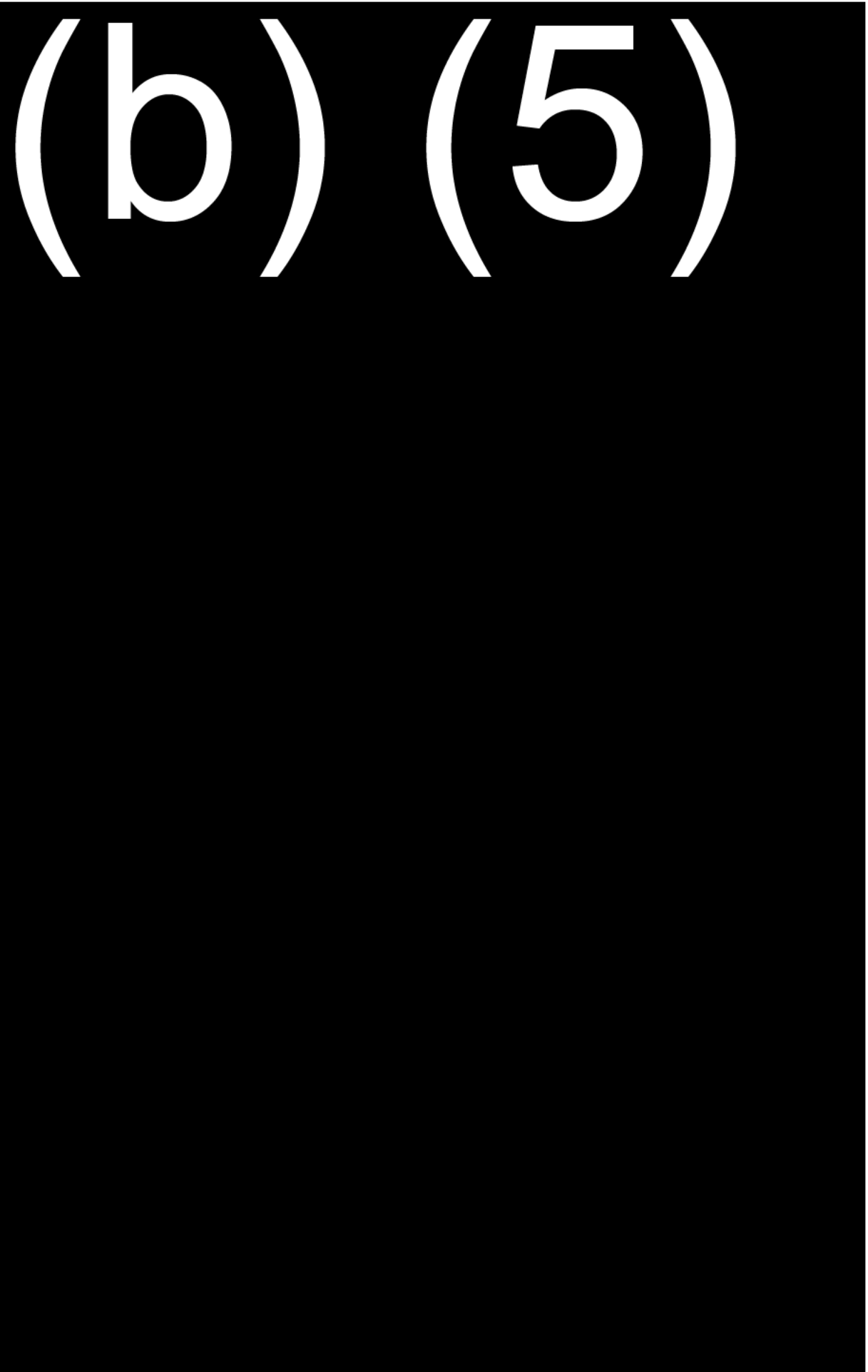
Below are the responses to go back to PAD regarding answering questions that have come in....this is to provide guidance to PAD...

Thanks.

Megan A. Bennett

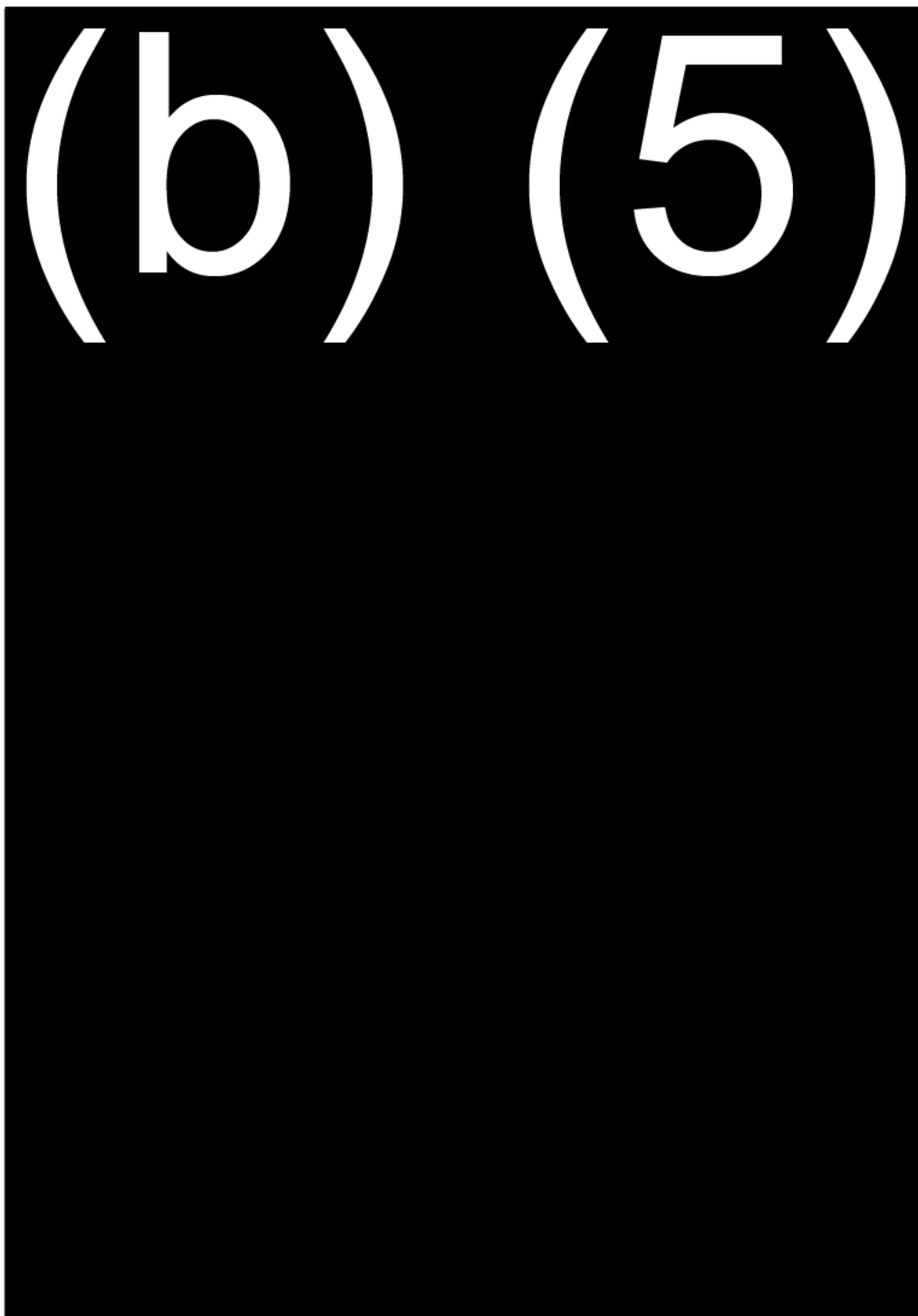
(b) (5)

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(b) (5)



To: Gross, Charles R. (b) (6) Roessner, Joel J.

(b) (6)

(b) (6)

(b) (6)

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(b) (6)

From: Allen, Joseph J.

Sent: Thur 10/5/2017 7:23:15 PM

Subject: FW: Legal Anaysis Bump-Fire

Counsel Memo to OAG re 'Bump Fire' Stocks 10-5-17.docx

Thanks to all....

From: Allen, Joseph J.

Sent: Thursday, October 5, 2017 3:15 PM

To: (b) (6) (OAG) (JMD) (b) (6)

Cc: (b) (6) (ODAG) (JMD) (b) (6)

(b) (6)

(b) (6) (OLP) (JMD) (b) (6)

Subject: Legal Anaysis Bump-Fire

(b) (6) Analysis attached. Will forward signed copy on request.

--Joe



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of Chief Counsel

Washington, DC 20226

www.atf.gov

October 5, 2017

200000(b) (6)

MEMORANDUM TO: Office of the Attorney General
United States Department of Justice

FROM: Chief Counsel
Bureau of Alcohol, Tobacco, Firearms and Explosives

(b) (5)

PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

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PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

Charles R. Gross

To: (b) (6) (OAG) (JMD) (b) (6)
Cc: (b) (6) (OAG) (JMD) (b) (6)
(b) (6) OLP) (JMD) (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 7:14:44 PM
Subject: Legal Anaysis Bump-Fire
Counsel Memo to OAG re 'Bump Fire' Stocks 10-5-17.docx

(b) (6) Analysis attached. Will forward signed copy on request.

--Joe



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of Chief Counsel

Washington, DC 20226

www.atf.gov

October 5, 2017

200000: [REDACTED]

MEMORANDUM TO: Office of the Attorney General
United States Department of Justice

FROM: Chief Counsel
Bureau of Alcohol, Tobacco, Firearms and Explosives

(b) (5)

PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

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Office of the Attorney General

(b) (5)



PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

Charles R. Gross

To: Gross, Charles R. (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 5:44:38 PM
Memo re 'Bump Fire' Stocks ja (b) (6) 10-5-17.docx
ATT00001.txt



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of Chief Counsel

Washington, DC 20226

www.atf.gov

October 5, 2017

200000 (b) (6)

MEMORANDUM TO: Office of the Attorney General
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FROM: Chief Counsel
Bureau of Alcohol, Tobacco, Firearms and Explosives

(b) (5)

PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

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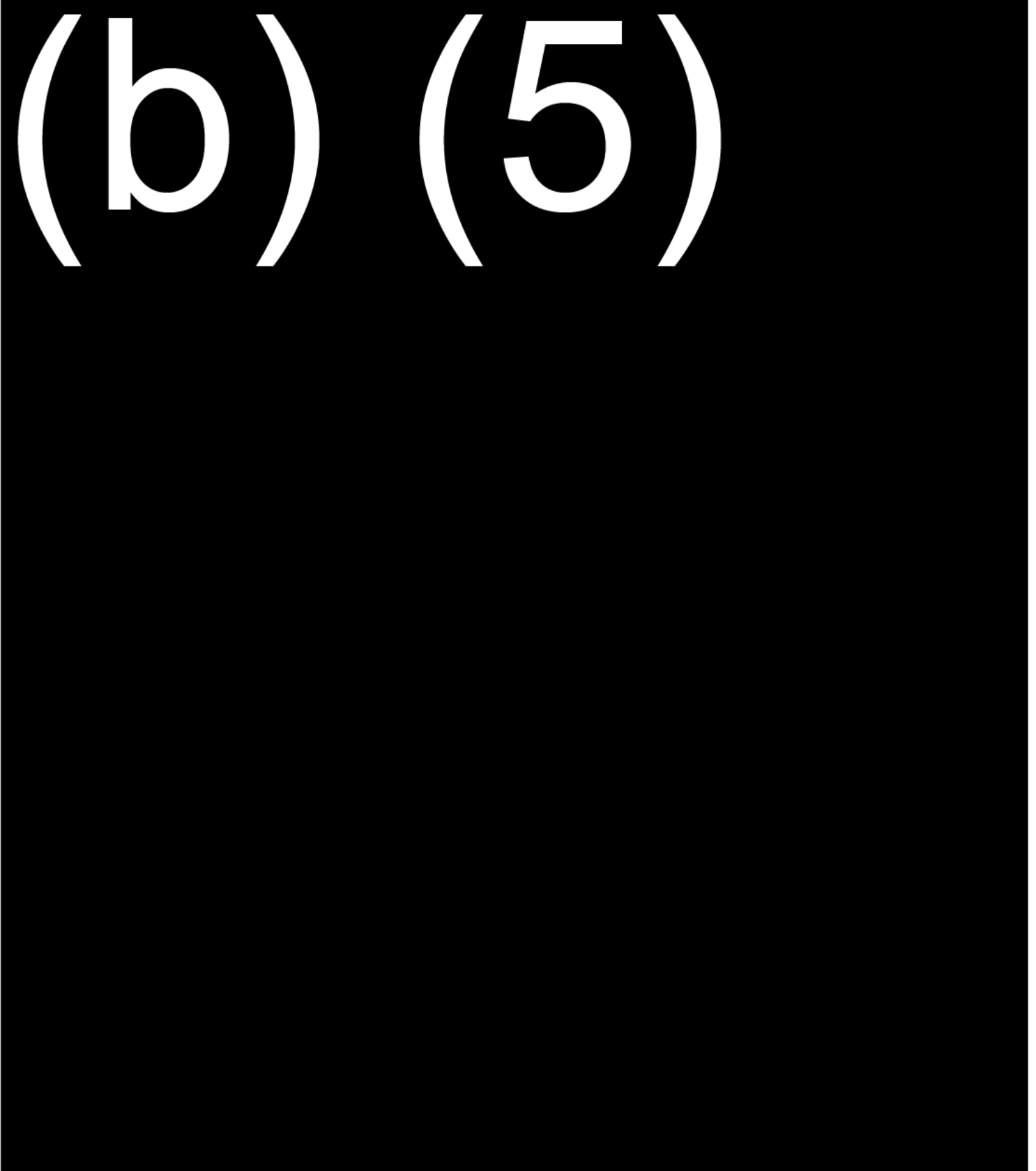
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(b) (5)



PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Office of the Attorney General

Charles R. Gross

To: (b) (6) (ODAG) (JMD) (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 3:53:15 PM
Subject: Fwd: Touching base

FYSA

Begin forwarded message:

From: "Allen, Joseph J." (b) (6)
Date: October 5, 2017 at 11:52:48 AM EDT
To: (b) (6) (OAG) (JMD)" (b) (6)
Subject: Re: Touching base

(b) (6) As soon as the Director clears the round table, we'll present to clear. I think 2 is most realistic.

Thank you, Joe

On Oct 5, 2017, at 11:49 AM (b) (6) (OAG) (JMD) (b) (6) wrote:

What's the earliest possible time we can get ATF's analysis? Getting a lot of pressure to get have an answer. 1 or 2 pm?

On Oct 5, 2017, at 10:10 AM, (b) (6) <(b) (6)> wrote:

(b) (6) 18 USC 922(o) (post-'86 machinery ban); 26 USC 5861(d) (general NFA criminal provision) and 5845(a)(6) (inclusion of machineguns in NFA) are the other relevant statutory provisions.

No other regs directly address.

On Oct 5, 2017, at 9:36 AM, (b) (6) (OAG) (JMD) (b) (6) wrote:

Thanks for the cell number

One thing I forgot to ask on the phone is whether there are any other relevant statues and regs than 26 USC 5845(b), 18 USC 921(a)(23), 27 CFR 478.11, and 27 CFR

478.36?

Thanks

26 USC 5845(b): Definition of machinegun

(b)MACHINEGUN

The term “machinegun” means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

18 USC 921(a)(23): Definition of machinegun

(23) The term “machinegun” has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

27 CFR 478.11 - Meaning of terms.

Machine gun. Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

27 CFR § 478.36 Transfer or possession of machine guns.

No person shall transfer or possess a machine gun except:

- (a) A transfer to or by, or possession by or under the authority of, the United States, or any department or agency thereof, or a State, or a department, agency, or political subdivision thereof. (See Part 479 of this chapter); or
- (b) Any lawful transfer or lawful possession of a machine gun that was lawfully possessed before May 19, 1986 (See Part 479 of this chapter).

-----Original Message-----

From: (b) (6) [mailto:(b) (6)]
Sent: Thursday, October 5, 2017 9:25 AM
To: (b) (6) (OAG) <(b) (6)>
Subject: RE: Touching base

(b) (6) My cell is (b) (6)

-----Original Message-----

From: (b) (6) (OAG) (JMD)
Sent: Thursday, October 5, 2017 8:58 AM
To: Allen, Joseph J. <(b) (6)>
Subject: RE: Touching base

Please give me a call when you can

-----Original Message-----

From: (b) (6)
[mailto:(b) (6)]
Sent: Thursday, October 5, 2017 5:30 AM
To: (b) (6) (OAG) <(b) (6)>
Subject: Re: Touching base

(b) (6) Sorry I missed this last night. Will call this morning.

Joe

> On Oct 4, 2017, at 8:45 PM, (b) (6) (OAG)
(JMD) (b) (6) wrote:
>
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to touch base. If not, then can in the morning.
>
> My cell is (b) (6)

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From: Allen, Joseph J.
Sent: Thur 10/5/2017 3:52:48 PM
Subject: Re: Touching base

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(b) Any lawful transfer or lawful possession of a machine gun that was lawfully possessed before May 19, 1986 (See Part 479 of this chapter).

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From: (b) (6) [mailto:(b) (6)]
Sent: Thursday, October 5, 2017 9:25 AM
To: (b) (6) OAG <(b) (6)>
Subject: RE: Touching base

(b) (6) My cell is (b) (6)

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From: (b) (6) OAG (JMD)
Sent: Thursday, October 5, 2017 8:58 AM
To: Allen, Joseph J. <(b) (6)>
Subject: RE: Touching base

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Sent: Thursday, October 5, 2017 5:30 AM
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Cc: Gross, Charles R. (b) (6)
To: (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 3:28:38 PM
Subject: Fwd: Emailing: Akins Powerpoint reconsideration
Memo re 'Bump Fire' Stocks ja (b) (6) 10-5-17.docx
[ATT00001.htm](#)

(b) (6)umping the chain while Chuck & I are both in meetings. Can you review/comment?

Begin forwarded message:

From: (b) (6)
Date: October 5, 2017 at 11:26:31 AM EDT
To: "Allen, Joseph J." (b) (6), "Gross, Charles R." (b) (6)
(b) (6)
Cc: "Roessner, Joel J." (b) (6)
Subject: RE: Emailing: Akins Powerpoint reconsideration

Here is a revised analysis for further review ASAP.

Thanks,

(b) (6)

(b) (6) Senior Policy Counsel (Firearms and Explosives)
Bureau of Alcohol, Tobacco, Firearms and Explosives
United States Department of Justice
99 New York Ave., NE, Room (b) (6)
Washington, D.C. 20226
Tel: (b) (6)
Fax: (b) (6)

-----Original Message-----

From: Allen, Joseph J.
Sent: Thursday, October 05, 2017 10:50 AM
To: Gross, Charles R. (b) (6)
(b) (6)
Cc: Roessner, Joel J. (b) (6)
Subject: RE: Emailing: Akins Powerpoint reconsideration

My revised intro attached. Adding (b) (6)

-----Original Message-----

From: Gross, Charles R.
Sent: Thursday, October 5, 2017 8:34 AM
To: (b) (6); Allen, Joseph J. (b) (6)

Cc: Roessner, Joel J. <(b) (6)>
Subject: RE: Emailing: Akins Powerpoint reconsideration

I have suggested edits/comments in the "analysis" section, for your consideration.

-----Original Message-----

From: (b) (6)
Sent: Wednesday, October 04, 2017 9:19 PM
To: Allen, Joseph J. <(b) (6)>; Gross, Charles R. <(b) (6)>
Cc: Roessner, Joel J. <(b) (6)>
Subject: RE: Emailing: Akins Powerpoint reconsideration
Importance: High

Attached is a rough first draft of the memo. Please provide any feedback.

Joe - what's the deadline on this?

Thanks

(b) (6)

(b) (6) Senior Policy Counsel (Firearms and Explosives) Bureau of Alcohol, Tobacco,
Firearms and Explosives United States Department of Justice
99 New York Ave., NE, Room (b) (6)
Washington, D.C. 20226
Tel: (b) (6)
Fax: (b) (6)

-----Original Message-----

From: Allen, Joseph J.
Sent: Wednesday, October 04, 2017 6:08 PM
To: (b) (6); Gross, Charles R. <(b) (6)>
Cc: Roessner, Joel J. <(b) (6)>
Subject: RE: Emailing: Akins Powerpoint reconsideration

Seems far more suitable to objective testing and evaluation.

-----Original Message-----

From: (b) (6)
Sent: Wednesday, October 4, 2017 6:03 PM
To: Allen, Joseph J. <(b) (6)>; Gross, Charles R. <(b) (6)>
Cc: Roessner, Joel J. <(b) (6)>
Subject: RE: Emailing: Akins Powerpoint reconsideration

Ok.

(b) (5)

(b) (5)

(b) (6)

(b) (6) Senior Policy Counsel (Firearms and Explosives) Bureau of Alcohol, Tobacco,
Firearms and Explosives United States Department of Justice
99 New York Ave., NE, Room (b) (6)
Washington, D.C. 20226
Tel: (b) (6)
Fax: (b) (6)

-----Original Message-----

From: Allen, Joseph J.

Sent: Wednesday, October 04, 2017 5:55 PM

To: (b) (6), Gross, Charles R. (b) (6)

Cc: Roessner, Joel J. (b) (6)

Subject: RE: Emailing: Akins Powerpoint reconsideration

(b) (5)

--Joe

-----Original Message-----

From: (b) (6)

Sent: Wednesday, October 4, 2017 5:25 PM

To: Gross, Charles R. (b) (6), Allen, Joseph J. (b) (6)

Cc: Roessner, Joel J. (b) (6)

Subject: RE: Emailing: Akins Powerpoint reconsideration

Perhaps, but it how about this? In discussions with (b) (6) we were thinking of

(b) (5)

(b) (5)

What do you think?

(b) (6)

(b) (6) Senior Policy Counsel (Firearms and Explosives) Bureau of Alcohol, Tobacco,
Firearms and Explosives United States Department of Justice

99 New York Ave., NE, Room (b) (6)
Washington, D.C. 20226
Tel: (b) (6)
Fax: (b) (6)

-----Original Message-----

From: Gross, Charles R.
Sent: Wednesday, October 04, 2017 5:10 PM
To: Allen, Joseph J. <(b) (6)>
Cc: Roessner, Joel J. (b) (6)
Subject: RE: Emailing: Akins Powerpoint reconsideration

(b) (5)

-----Original Message-----

From: Allen, Joseph J.
Sent: Wednesday, October 04, 2017 4:02 PM
To: (b) (6); Gross, Charles R. (b) (6)
Cc: Roessner, Joel J. (b) (6)
Subject: FW: Emailing: Akins Powerpoint reconsideration

FYSA. Counsel PPT on Akins reconsideration of MG classification.

-----Original Message-----

From: (b) (6)
Sent: Wednesday, October 4, 2017 3:32 PM
To: Allen, Joseph J. <(b) (6)>
Subject: Emailing: Akins Powerpoint reconsideration

Your message is ready to be sent with the following file or link attachments:

Akins Powerpoint reconsideration

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of

Washington, DC 20226

www.atf.gov

October 5, 2017

200000(b) (6)

MEMORANDUM TO:

United States Department of Justice

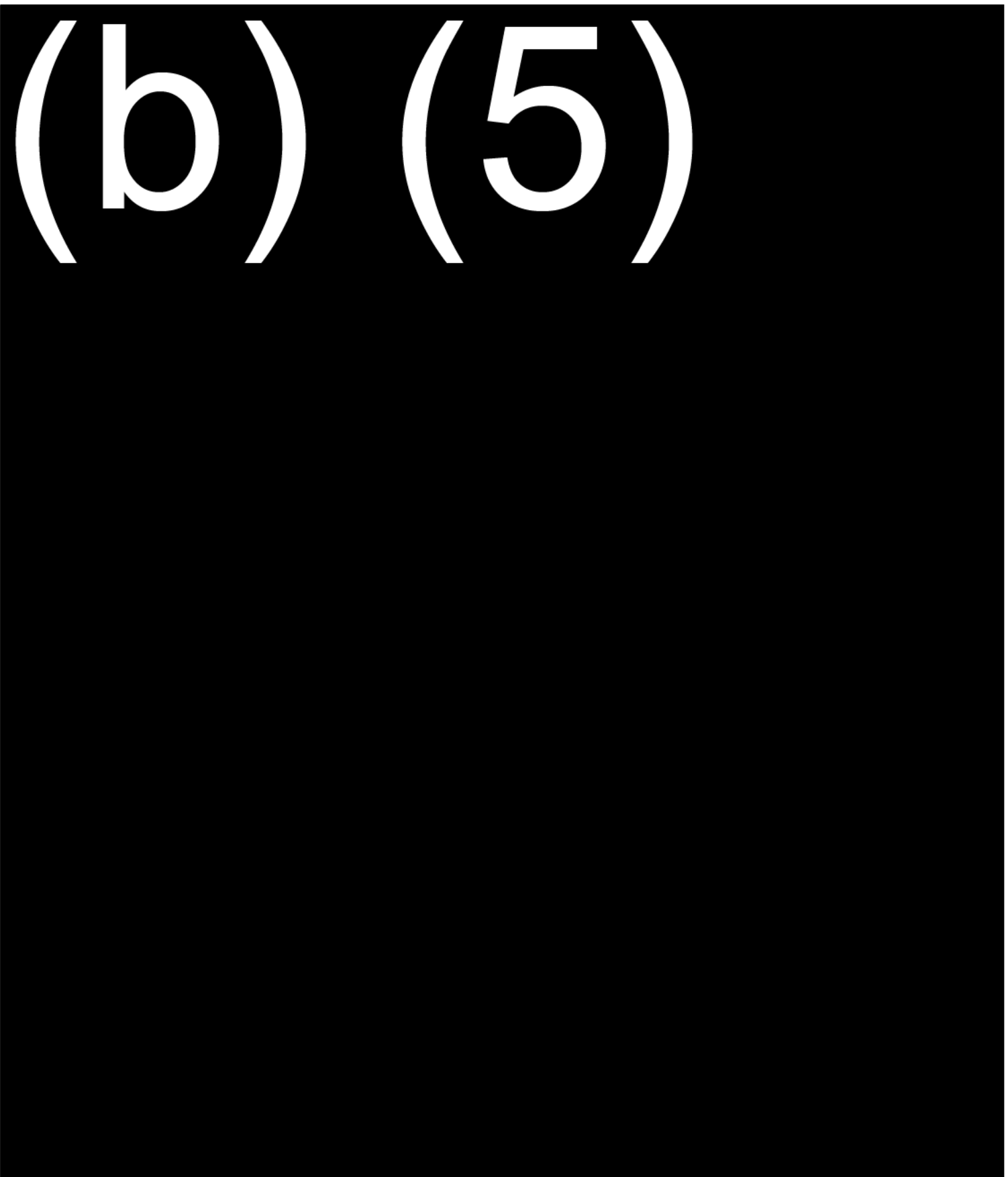
FROM:

Bureau of Alcohol, Tobacco, Firearms and Explosives

(b) (5)

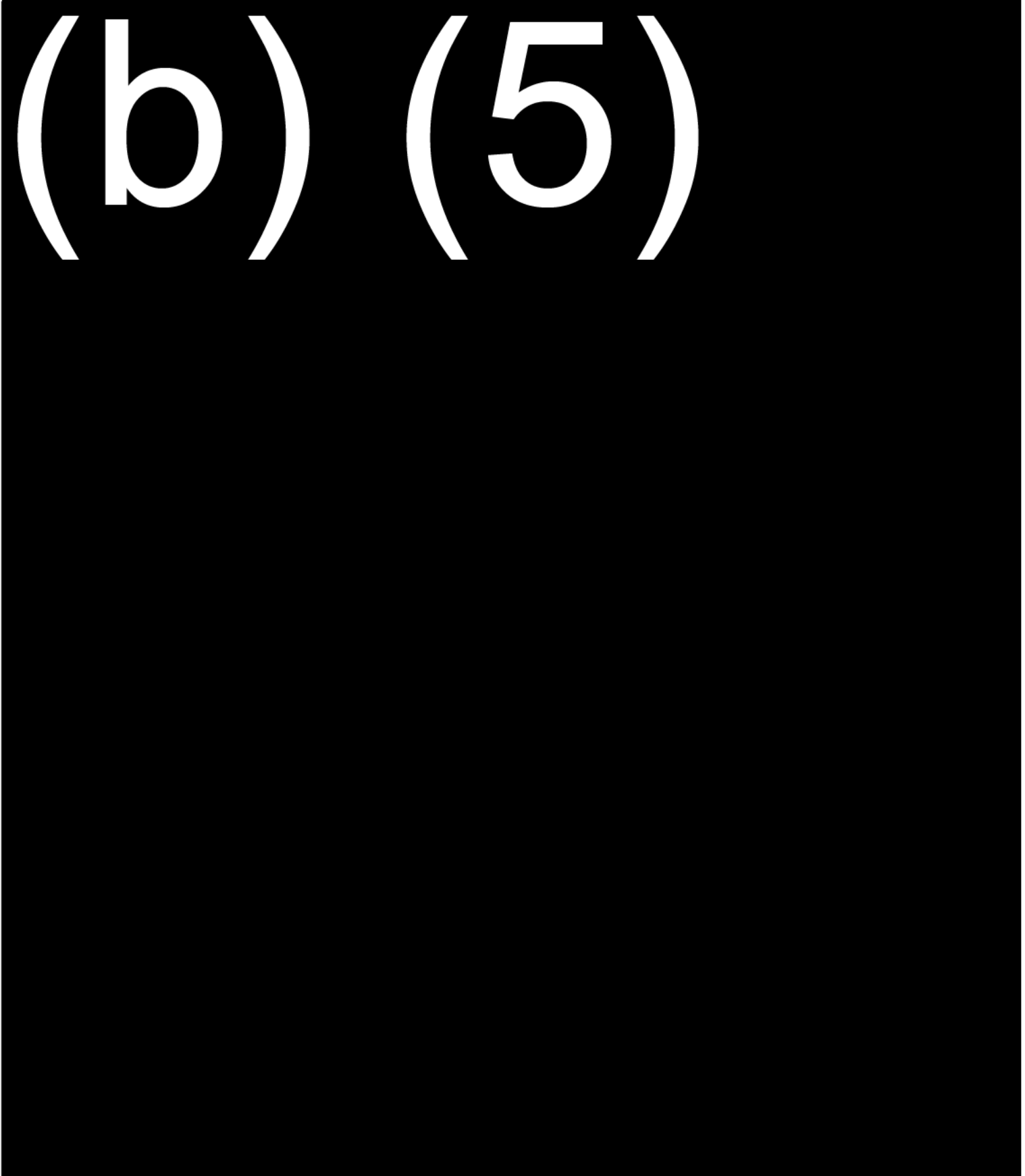
PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

(b) (5)



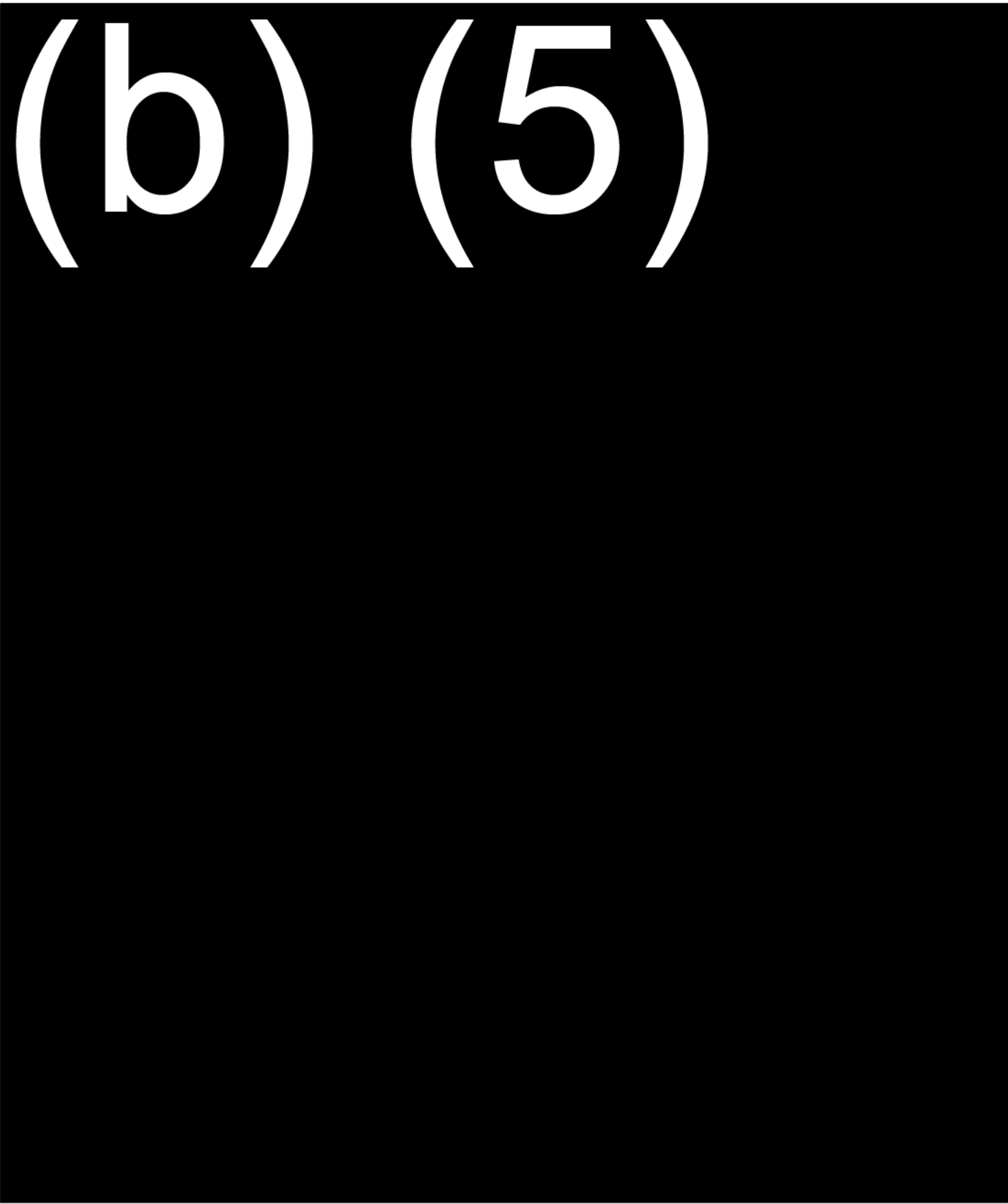
PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

(b) (5)



PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

(b) (5)



PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Cc: (b) (6) (ODAG) (JMD) (b) (6)
To: (b) (6) (OAG) (JMD) (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 3:14:21 PM
Subject: 2013 Congressional
1052017 100242AM 117820 Perlmutter.pdf
ATT00001.txt

(b) (6) We located an additional Congressional from 2013 on Slide-Fire. (It is in the DOJ IQ system).

Response is attached. Will forward the incoming next.



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Assistant Director

Washington, DC 20226
www.atf.gov

APR 16 2013

The Honorable Ed Perlmutter
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Perlmutter:

This is in response to your letter dated March 5, 2013, to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to rescind a previous evaluation letter and to classify all bump-fire stocks (to include specifically the Slide Fire Solutions stock) as machineguns.

As you have indicated, machineguns are defined in the National Firearms Title Act, 26 United States Code Chapter 53 Section 5845(b). The definition has four distinct parts. The first, as you point out, states that a machinegun is "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a *single function of the trigger*." The remaining portions of the definition go on to state that: "[t]he term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts *designed and intended, for use in converting a weapon into a machinegun*, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

In the course of examining a number of bump-fire stocks, ATF found that none of these devices could shoot nor did they constitute firearm frames or receivers; therefore, the first portion of the machinegun definition can not apply. Those bump-fire stocks which were found to convert a weapon to shoot automatically were classified as machineguns and regulated accordingly—most notably, the Akins Accelerator. Other bump-fire stocks (such as the SlideFire Solutions stock) that ATF determined to be unable to convert a weapon to shoot automatically were not classified as machineguns.

Reviewing findings with respect to the Akins and Slide Solutions, ATF, in Ruling 2006-2, found that the Akins Accelerator incorporated a mechanism to automatically reset and activate the fire-control components of a firearm following the single input of a user. Thus, the Akins Accelerator acted to convert a semiautomatic firearm to shoot automatically. Conversely, the Slide Fire Solutions stock requires continuous multiple inputs by the user for each successive

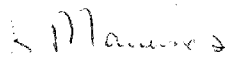
The Honorable Ed Perlmutter

shot. Similarly, other devices exist, such as the HellFire Trigger, which attach to and act upon the trigger of a firearm and also work to increase the rate or volume of fire of the firearm. Like the Slide Fire Solutions stock, the HellFire Trigger does not provide an automatic action—requiring instead continuous multiple inputs by the user for each successive shot.

Public safety is always a primary concern of ATF. We remain committed to the security of our Nation and the fight against violent crime. However, bump-fire stocks that do not fall within any of the classifications for firearm contained in Federal law may only be classified as firearms components. Stocks of this type are not subject to the provisions of Federal firearms statutes. Therefore, ATF does not have the authority to restrict their lawful possession, use, or transfer.

We hope this information proves helpful in responding to your constituent. Please let me know if we may be of further assistance.

Sincerely yours,



Richard W. Marianos
Assistant Director
Public and Governmental Affairs

To: (b) (6) (ODAG) (JMD) (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 3:10:00 PM
Subject: 2013 Congressional
1052017 100242AM 117820 Perlmutter.pdf
ATT00001.txt

(b) (6) We located an additional Congressional from 2013 on Slide-Fire. (It is in the DOJ IQ system).

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U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Assistant Director

Washington, DC 20226
www.atf.gov

APR 16 2013

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U.S. House of Representatives
Washington, DC 20515

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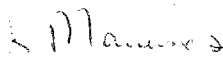
The Honorable Ed Perlmutter

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Public safety is always a primary concern of ATF. We remain committed to the security of our Nation and the fight against violent crime. However, bump-fire stocks that do not fall within any of the classifications for firearm contained in Federal law may only be classified as firearms components. Stocks of this type are not subject to the provisions of Federal firearms statutes. Therefore, ATF does not have the authority to restrict their lawful possession, use, or transfer.

We hope this information proves helpful in responding to your constituent. Please let me know if we may be of further assistance.

Sincerely yours,



Richard W. Marianos
Assistant Director
Public and Governmental Affairs

To: Gross, Charles R. (b) (6)
(b) (6)
Cc: Roessner, Joel J. (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 2:50:13 PM
Subject: RE: Emailing: Akins Powerpoint reconsideration
Memo re 'Bump Fire' Stocks ja.docx

My revised intro attached. Adding (b) (6)

-----Original Message-----

From: Gross, Charles R.
Sent: Thursday, October 5, 2017 8:34 AM
To: (b) (6); Allen, Joseph J. (b) (6)
Cc: Roessner, Joel J. <(b) (6)>
Subject: RE: Emailing: Akins Powerpoint reconsideration

I have suggested edits/comments in the "analysis" section, for your consideration.

-----Original Message-----

From: (b) (6)
Sent: Wednesday, October 04, 2017 9:19 PM
To: Allen, Joseph J. (b) (6); Gross, Charles R. (b) (6)
Cc: Roessner, Joel J. <(b) (6)>
Subject: RE: Emailing: Akins Powerpoint reconsideration
Importance: High

Attached is a rough first draft of the memo. Please provide any feedback.

Joe - what's the deadline on this?

Thanks

(b) (6)

(b) (6) Senior Policy Counsel (Firearms and Explosives) Bureau of Alcohol, Tobacco, Firearms and
Explosives United States Department of Justice
99 New York Ave., NE, Room (b) (6)
Washington, D.C. 20226
Tel: (b) (6)
Fax: (b) (6)

-----Original Message-----

From: Allen, Joseph J.
Sent: Wednesday, October 04, 2017 6:08 PM
To: (b) (6); Gross, Charles R. (b) (6)
Cc: Roessner, Joel J. (b) (6)
Subject: RE: Emailing: Akins Powerpoint reconsideration

Seems far more suitable to objective testing and evaluation.

-----Original Message-----

From: (b) (6)
Sent: Wednesday, October 4, 2017 6:03 PM
To: Allen, Joseph J. (b) (6); Gross, Charles R. (b) (6)
Cc: Roessner, Joel J. (b) (6)
Subject: RE: Emailing: Akins Powerpoint reconsideration

(b) (5)

(b) (6)

(b) (6) Senior Policy Counsel (Firearms and Explosives) Bureau of Alcohol, Tobacco, Firearms and
Explosives United States Department of Justice
99 New York Ave., NE, Room (b) (6)
Washington, D.C. 20226
Tel: (b) (6)
Fax: (b) (6)

-----Original Message-----

From: Allen, Joseph J.
Sent: Wednesday, October 04, 2017 5:55 PM
To: (b) (6) Gross, Charles R. (b) (6)
Cc: Roessner, Joel J. (b) (6)
Subject: RE: Emailing: Akins Powerpoint reconsideration

(b) (5)

--Joe

-----Original Message-----

From: (b) (6)
Sent: Wednesday, October 4, 2017 5:25 PM
To: Gross, Charles R. (b) (6) Allen, Joseph J. (b) (6)
Cc: Roessner, Joel J. (b) (6)
Subject: RE: Emailing: Akins Powerpoint reconsideration

Perhaps, but it how about this? In discussions with (b) (6) we were thinking of (b) (5)
(b) (5)

(b) (5)

What do you think?

(b) (6)

(b) (6) Senior Policy Counsel (Firearms and Explosives) Bureau of Alcohol, Tobacco, Firearms and
Explosives United States Department of Justice
99 New York Ave., NE, Room (b) (6)
Washington, D.C. 20226
Tel: (b) (6)
Fax: (b) (6)

-----Original Message-----

From: Gross, Charles R.
Sent: Wednesday, October 04, 2017 5:10 PM

To: Allen, Joseph J. (b) (6)
Cc: Roessner, Joel J. (b) (6)
Subject: RE: Emailing: Akins Powerpoint reconsideration

(b) (5)

-----Original Message-----

From: Allen, Joseph J.
Sent: Wednesday, October 04, 2017 4:02 PM
To: (b) (6) Gross, Charles R. (b) (6)
Cc: Roessner, Joel J. (b) (6)
Subject: FW: Emailing: Akins Powerpoint reconsideration

FYSA. Counsel PPT on Akins reconsideration of MG classification.

-----Original Message-----

From: (b) (6)
Sent: Wednesday, October 4, 2017 3:32 PM
To: Allen, Joseph J. (b) (6)
Subject: Emailing: Akins Powerpoint reconsideration

Your message is ready to be sent with the following file or link attachments:

Akins Powerpoint reconsideration

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of

Washington, DC 20226

www.atf.gov

October 4, 2017

200000:EME

MEMORANDUM TO:

United States Department of Justice

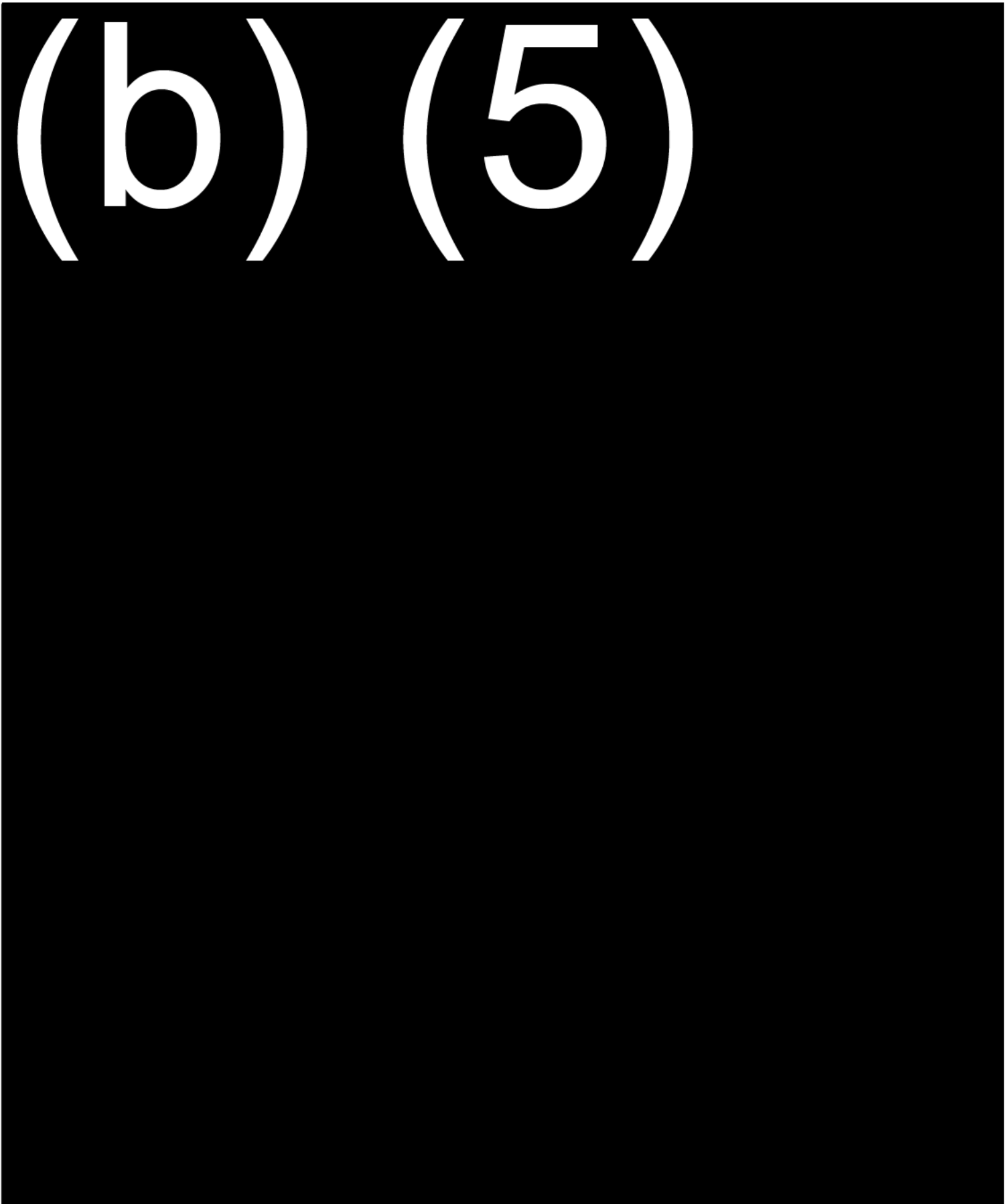
FROM:

Bureau of Alcohol, Tobacco, Firearms and Explosives

(b) (5)

PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

(b) (5)



PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

(b) (5)

PREDECISIONAL - ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

(b) (5)

DRAFT

[ATF Official]

To: (b) (6) (OAG) (JMD) (b) (6)
From: Allen, Joseph J.
Sent: Thur 10/5/2017 2:09:38 PM
Subject: Re: Touching base

(b) (6) 8 USC 922(o) (post-'86 machinery ban); 26 USC 5861(d) (general NFA criminal provision) and 5845(a)(6) (inclusion of machineguns in NFA) are the other relevant statutory provisions.

No other regs directly address.

On Oct 5, 2017, at 9:36 AM, (b) (6) (OAG) (JMD) (b) (6) wrote:

Thanks for the cell number

One thing I forgot to ask on the phone is whether there are any other relevant statutes and regs than 26 USC 5845(b), 18 USC 921(a)(23), 27 CFR 478.11, and 27 CFR 478.36?

Thanks

26 USC 5845(b): Definition of machinegun

(b)MACHINEGUN

The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

18 USC 921(a)(23): Definition of machinegun

(23) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

27 CFR 478.11 - Meaning of terms.

Machine gun. Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

27 CFR § 478.36 Transfer or possession of machine guns.

No person shall transfer or possess a machine gun except:

(a) A transfer to or by, or possession by or under the authority of, the United States, or any department or agency thereof, or a State, or a department, agency, or political subdivision thereof. (See Part 479 of this chapter); or

(b) Any lawful transfer or lawful possession of a machine gun that was lawfully possessed before May 19, 1986 (See Part 479 of this chapter).

-----Original Message-----

From: (b) (6)
Sent: Thursday, October 5, 2017 9:25 AM
To: (b) (6) (OAG) <(b) (6)>
Subject: RE: Touching base

(b) (6) My cell is (b) (6)

-----Original Message-----

From: (b) (6) (OAG) (JMD)
Sent: Thursday, October 5, 2017 8:58 AM
To: Allen, Joseph J. <(b) (6)>
Subject: RE: Touching base

Please give me a call when you can

-----Original Message-----

From: (b) (6) mailto:(b) (6)
Sent: Thursday, October 5, 2017 5:30 AM
To: (b) (6) (OAG) <(b) (6)>
Subject: Re: Touching base

(b) (6) Sorry I missed this last night. Will call this morning.

Joe

> On Oct 4, 2017, at 8:45 PM, (b) (6) (OAG) (JMD) (b) (6) wrote:
>
> I know it's late, but let me know if you have a second to touch base. If not, then can in the morning.
>
> My cell is (b) (6)

To: (b) (6) Gross, Charles
R: (b) (6)
Cc: Roessner, Joel J. (b) (6)
From: Allen, Joseph J.
Sent: Wed 10/4/2017 8:02:07 PM
Subject: FW: Emailing: Akins Powerpoint reconsideration
Akins Powerpoint reconsideration.ppt

FYSA. Counsel PPT on Akins reconsideration of MG classification.

-----Original Message-----

From: (b) (6)
Sent: Wednesday, October 4, 2017 3:32 PM
To: Allen, Joseph J. (b) (6)
Subject: Emailing: Akins Powerpoint reconsideration

Your message is ready to be sent with the following file or link attachments:

Akins Powerpoint reconsideration

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.



AKINS ACCELERATOR

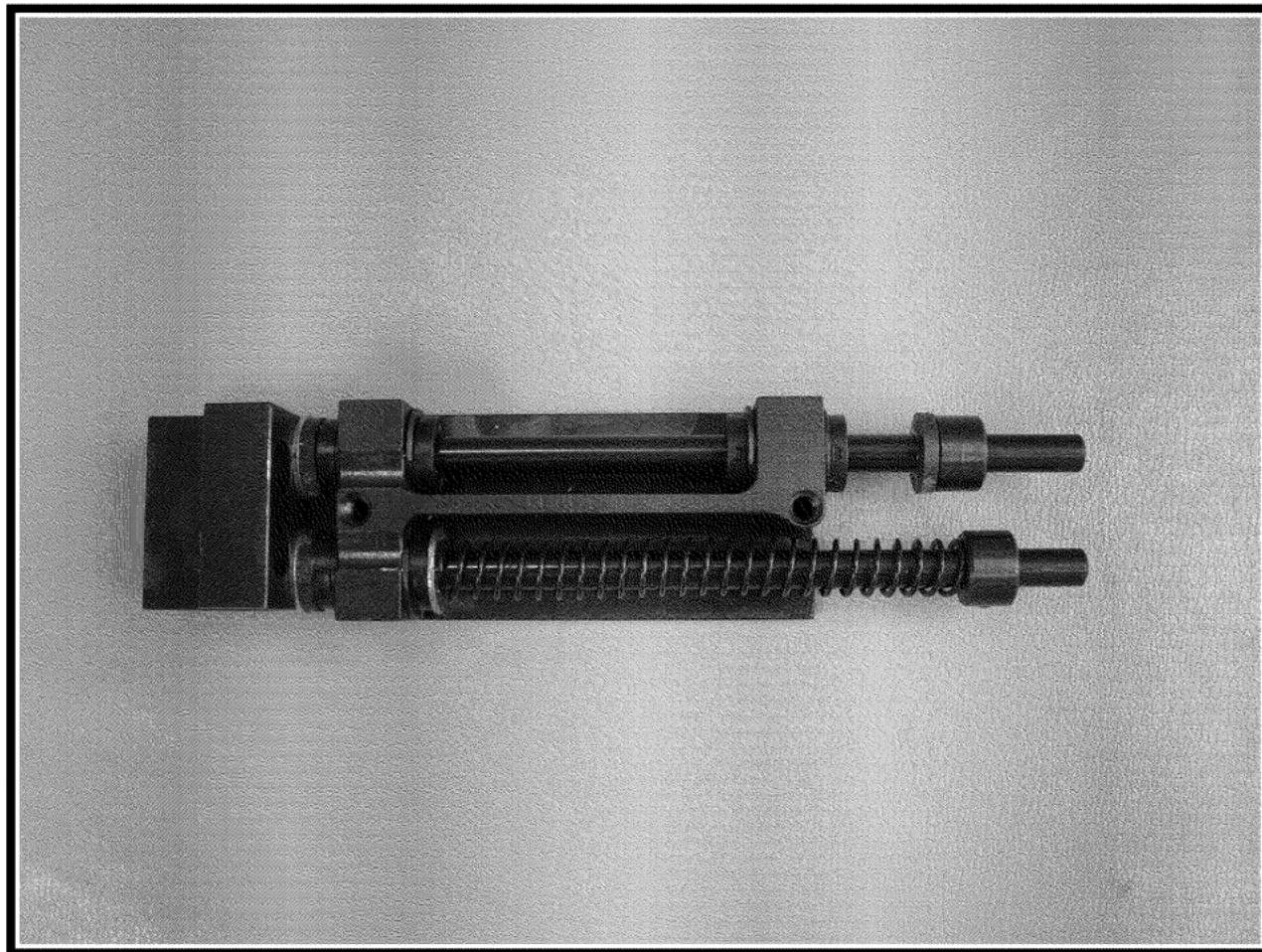
Is it a Machinegun?

August 2, 2007

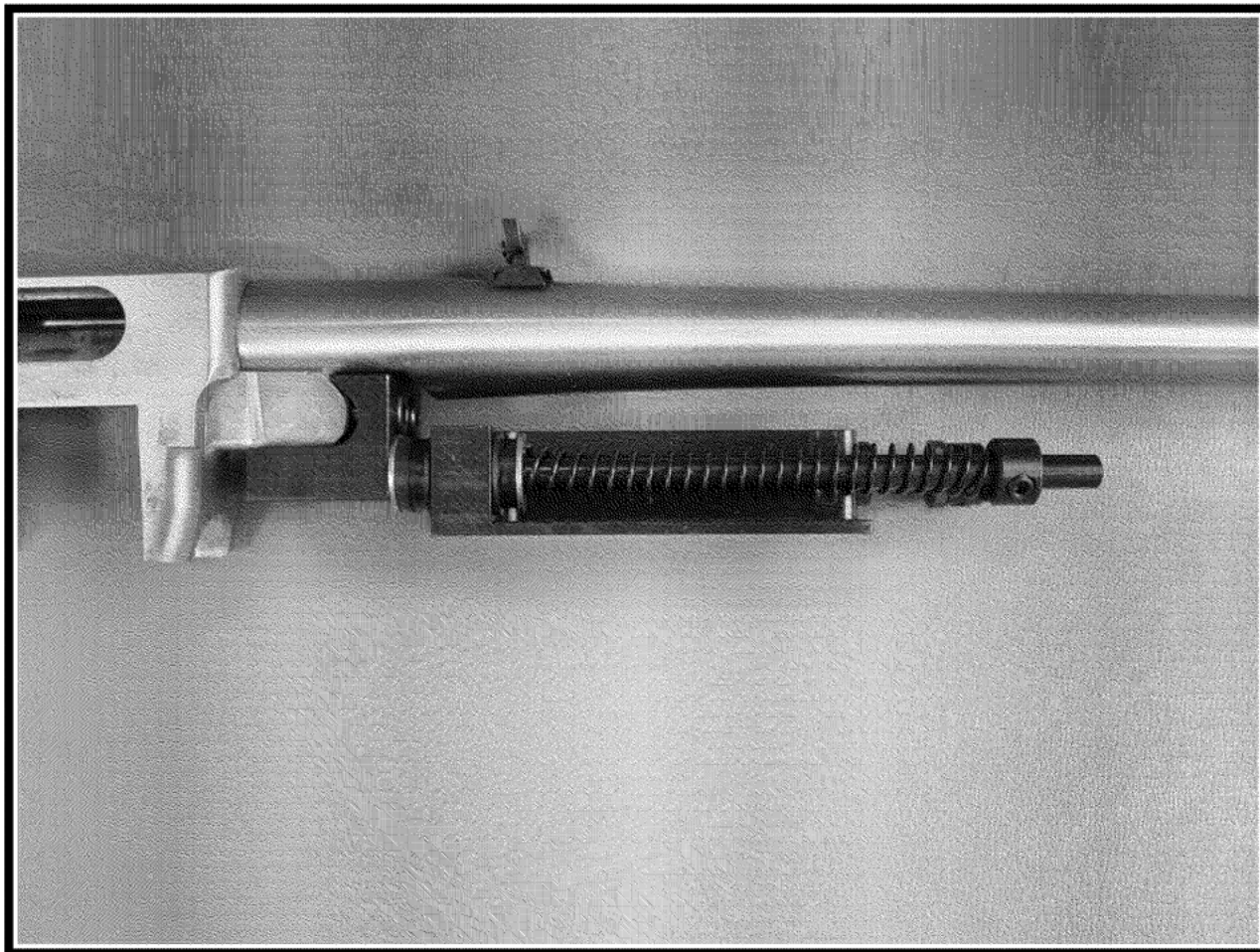


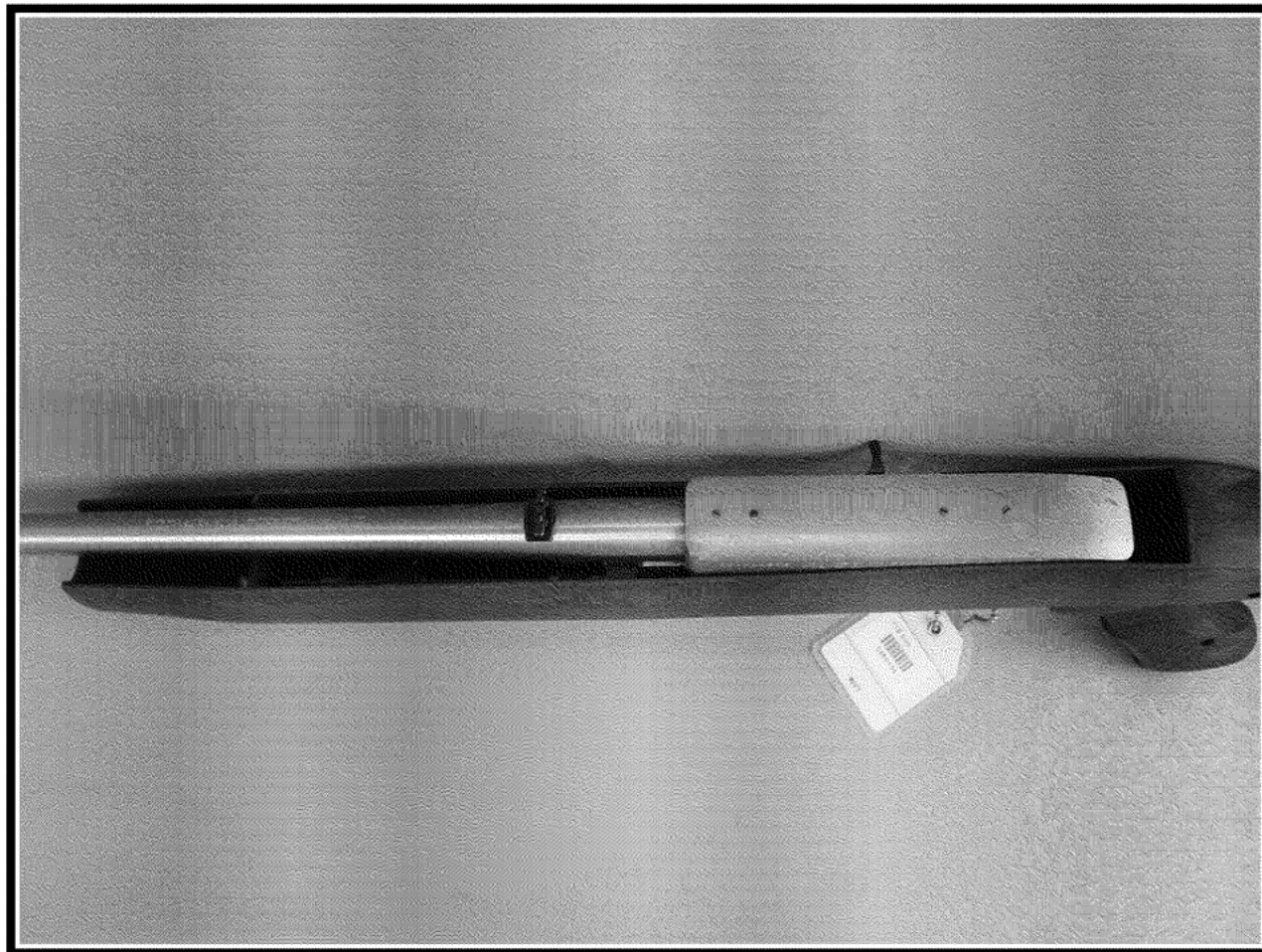
AKINS ACCELERATOR

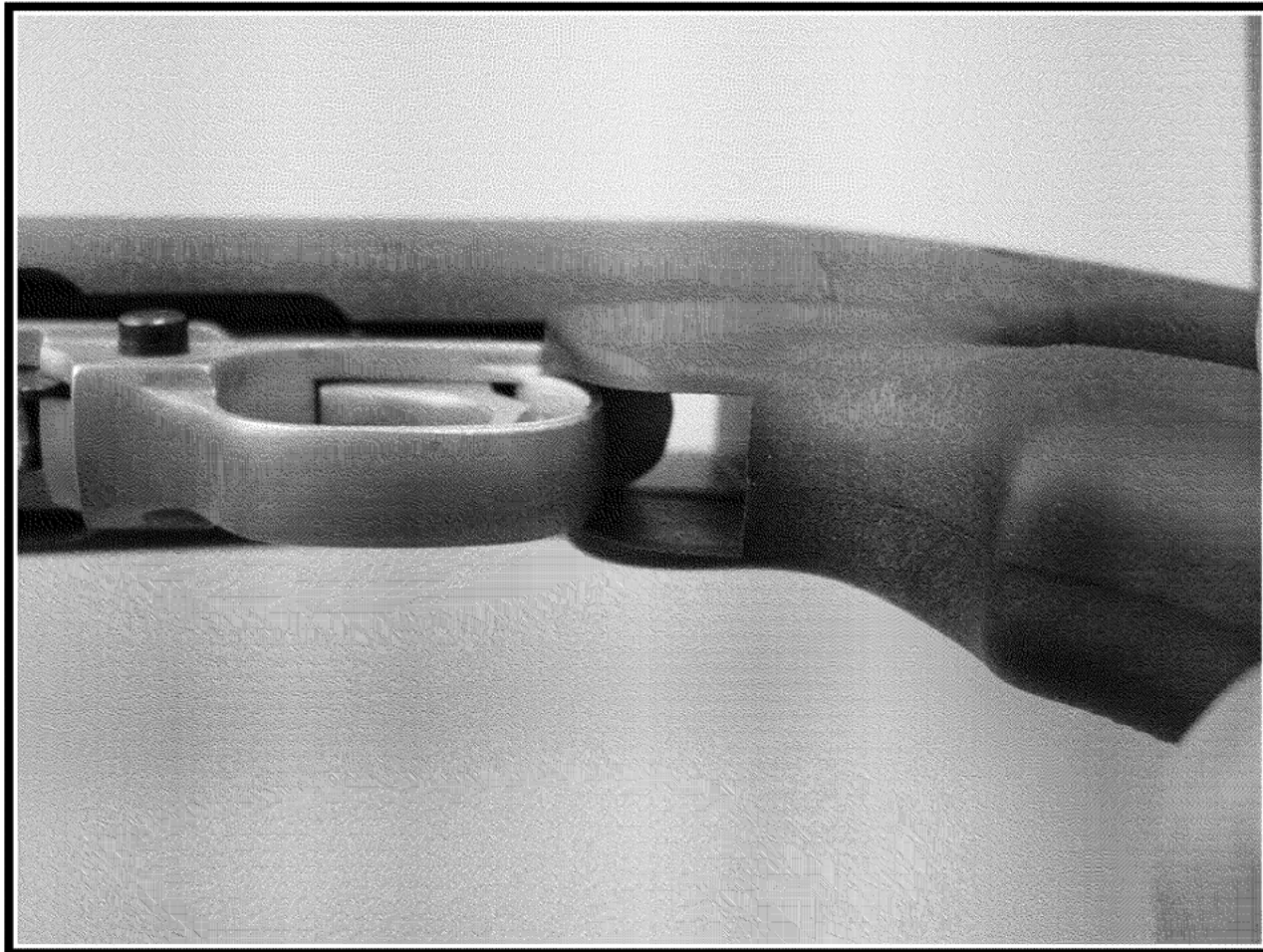










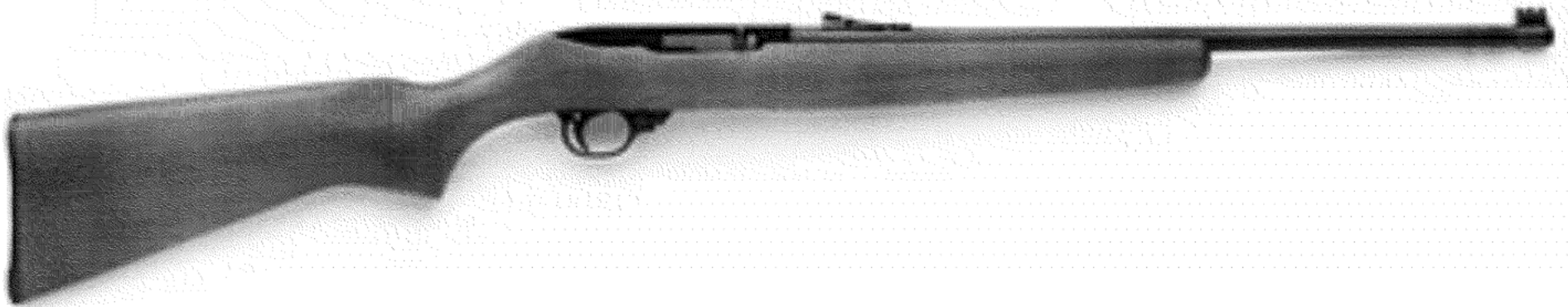








Ruger 10/22





AKINS ACCELERATOR

Akins-Movie-2.wmv

Akins-Movie-2.wmv



Machinegun

- **Machinegun defined in 26 U.S.C. 5845(b) :**
 - Any weapon which shoots, is designed to shoot, or can be readily restored to shoot automatically more than one shot without manual reloading by a **single function of the trigger**;
 - The frame or receiver of any such weapon;
 - Any part designed and intended solely and exclusively or combination of parts designed and intended for use in converting a weapon to a machinegun;
 - Any combination of parts from which a machinegun can be assembled if the parts are under the control of a person.



Initial FTB Report on Akins Prototype

- **The proposed theory of operation of this stock involves the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire. The shooter places his trigger finger behind the two adjustable screws and forward of the weapon's trigger. After the weapon is initially fired and the action is moved to the rear (by the recoiling mechanism, the subsequent forward motion of the action is halted by the shooter's trigger finger being held against the adjustable screws. The trigger is then depressed, and a second firing of the weapon commences. The movements of the action within the stock assembly are used to consecutively fire the weapon in lieu of the traditional method of manually pulling the trigger.**



Conclusion of First Letter

- **Our examination has determined that the submitted stock assembly does not constitute a machinegun as defined in the NFA.**



Second Letter to Akins

- **Tom Bowers requested clarification of the initial letter due to the fact that it stated that the prototype broke during testing.**
- **Second letter sent stating “The theory of operation was clear even though the rifle/stock assembly did not perform as intended.”**



FTB Report on the Akins

Third letter to Bowers

- **The composite stock is designed for a Ruger 10/22 barrel and receiver. This stock permits the entire firearm (receiver and all its firing components) to recoil a short distance within the stock when fired. Rearward pressure on the trigger causes the firearm to discharge, and as the firearm moves rearward in the composite stock, the shooter's trigger finger contacts the stock. The trigger mechanically resets, and the accelerator, which has a coiled spring located forward of the firearm receiver, is compressed. Energy from this accelerator spring subsequently drives the firearm forward into its normal firing position and, in turn, causes the trigger to contact the shooter's trigger finger, making the weapon fire again. The Akins device assembled with a Ruger 10/22 is advertised to fire approximately 650 rounds per minute.**



Conclusion

- **“Live fire testing of the Akins Accelerator demonstrated that a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.”**
- **Accordingly, it is the position of this agency that conversion parts that are designed and intended to convert a weapon into a machinegun, that is, one that will shoot more than one shot, without manual reloading, by a single pull of the trigger, are regulated as machineguns under the National Firearms Act and Gun Control Act.**



History of the Akins

- **Akins Accelerator –Classified as a non-firearm on November 17, 2003.**
- **Another letter confirming this classification was issued on January 29, 2004.**
- **The Akins was reclassified as a machinegun on November 22, 2006.**
- **Ruling 2006-2 was issued by the Director on December 13, 2006 confirming that these types of trigger activating devices were machineguns.**



Justification for Initial Classification

- The proposed theory of operation of this stock involves the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire.
- Note: the trigger mechanically resets after each shot fired.



Justification for Machinegun Classification

- **“Live fire testing of the Akins Accelerator demonstrated that a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.”**



Request for Reconsideration by Counsel for Akins

Arguments

- **One shot per function**
- **Function = movement**
- **Trigger vs. trigger finger**



**What does “single function
of the trigger” mean?**



Statutory Interpretation

“Plain meaning” vs. Legislative Intent

- **If the statute is clear then must give plain meaning.**
- **If the statute is ambiguous or silent can then look outside the statute.**



Memorandum Dated Sept 1989

- **“A single function of the trigger” means “a single movement of the trigger.”**
- **A trigger “functions” by releasing the hammer (or other firing device) which results in expelling the projectile.**
- **Memorandum written in response to a “two-stage” trigger which fired a round when pulled and again when released – classified as not a machinegun.**



If “single function of the trigger” is ambiguous we can look to legislative history for guidance.



Legislative History

- **Testimony before Committee on Ways and Means by Karl T. Frederick, President, NRA, indicates that “single function of a trigger” meant “single pull of a trigger.”**
- **Mr. Frederick proposed this definition changing it from “any weapon designed to shoot automatically or semiautomatically twelve or more shots without reloading.”**



(b) (5)



Arguments by Akins

- **Prior determinations are inconsistent with Akins**



Previous Classifications

▪ AW-SIM	Not a machinegun/ machinegun
▪ Akins Accelerator	Not a machinegun/machinegun
▪ BASTARD	Machinegun
▪ AR-16	Machinegun
▪ Hellfire	Not a machinegun
▪ Tac Trigger	Not a machinegun
▪ Auto Burst	Not a machinegun
▪ “Two Stage” Triggers	Not a machinegun
▪ Tri Burst	Not a machinegun
▪ Howard sample	Machinegun
▪ GAT	Not a machinegun



(b) (5)



Arguments by Akins

- **AA is just a mechanical means of bump firing**



If we look to the shooter and not the machine





Arguments by Akins

- **ATF reversed initial position = Economic Damage**



Arguments by Akins

- **Rule of Lenity.** Where the intention of Congress is not clear from the act itself and reasonable minds might differ as to its intention, the court will adopt the less harsh meaning. Blacks Law Dictionary.
- **See Thompson Center.** After applying the ordinary rules of statutory construction, then, we are left with an ambiguous statute. The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor.



Alternatives to Classification as a Machinegun States' Interpretation

Three States have taken steps to outlaw these types of devices. They all define machinegun using the phrase “single function of the trigger” and yet have addressed these devices separately from machineguns.



IOWA

- Iowa defines “trigger activating device” within the statute which outlaws it.
- I.C.A. § 724.29
 - A person who sells or offers for sale a manual or power-driven trigger activating device constructed and designed so that when attached to a firearm increases the rate of fire of the firearm is guilty of an aggravated misdemeanor.



MINNESOTA

- **Minnesota outlaws “Trigger Activators” and defines them as “a removable manual or power driven trigger activating device constructed and designed so that, when attached to a firearm, the rate at which the trigger may be pulled increases and the rate of fire of the firearm increases to that of a machine gun.”**



CALIFORNIA

- **California outlaws “multiburst trigger activators” and defines them as:**
 - (A) A device designed or redesigned to be attached to a semiautomatic firearm which allows the firearm to discharge two or more shots in a burst by activating the device.
 - (B) A manual or power-driven trigger activating device constructed and designed so that when attached to a semiautomatic firearm it increases the rate of fire of that firearm.



Chief Counsel Recommendation

(b) (5)

To: (b) (6) (OAG) (JMD) (b) (6)
Cc: (b) (6) (ODAG) (JMD) (b) (6)
From: Allen, Joseph J.
Sent: Wed 10/4/2017 6:36:18 PM
Subject: Akins 11th Cir Litigation Pleadings
[Akins Appellant Brief.pdf](#)
[Akins Appellant Reply Brief.pdf](#)
[Akins Govt Appellee Brief.pdf](#)
[Akins Gun Owners America Amicus Brief.pdf](#)

(b) (6) Appellate pleadings in Akins attached.

Thanks, Joe

Docket No. 08-15640-F

**The United States
Court of Appeals
For
The Eleventh Circuit**

**William Akins, Appellant
v.
United States of America, Appellee**

**Appeal from the United States District Court
For
The Middle District of Florida
The Hon. Richard A. Lazzara, District Judge**

Brief of Appellant

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Certificate of Interested Persons

Appellant certifies that the following persons are known to him to have an interest in the outcome of this case:

The Hon. Richard Lazzara
John R. Monroe, Esq.
Eric Soskin, Esq.
Sheryl Loesch, Esq.
John F. Rudy, Esq.
Paul Parrish, Esq.
William Akins
United States of America

Statement on Oral Argument

Appellant believes that oral argument would aid the Court in deciding this case. Many issues were raised below by Appellant and not explicitly ruled upon by the District Court. It is highly likely that the Court will have questions about the potential interaction of these issues. In addition, because there is no finding of facts in the agency record and no statement of facts in the government's briefs in the District Court, oral argument may assist the Court in determining whether, as Appellant asserts, there is a genuine issue of material fact.

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Statement Regarding Adoption of Briefs of Other Parties

Appellant does not adopt the brief of any party.

Statement on Jurisdiction

The District Court had federal question jurisdiction of this case under 28 U.S.C. § 1346(a)(2), as the United States was the defendant.

The District Court action was finally disposed of by order of the court on September 23, 2008. A judgment was entered by the clerk the same day. Appellant filed a Notice of Appeal on October 1, 2008, so his appeal is timely. F.R.A.P. § 4(a)(1)(A).

Statement of the Issues

1. There is a Genuine Dispute of Material Fact
2. BATFE May Not Change the Meaning of a Criminal Statute Because of Perceived Changes in Technology
3. Public Safety is not a Valid Consideration in Interpreting Criminal Law
4. The District Court's Decision was Contrary to Law
5. The District Court Decided the Case on an Incomplete Agency Record
6. BATFE Showed Bias Against Akins
7. Akins was Constitutionally Entitled to a Hearing Because He Contested the Factual Basis for BATFE's Finding a Device to be a Machine Gun
8. Akins was Entitled to a Predeprivation Hearing Because BATFE's Testing Procedures were Suspect
9. 26 U.S.C. 5845(b) is Unconstitutionally Vague As Applied to Akins
10. The District Court Ignored Akins' Declaratory Judgment Action

Statement of the Case

Nature of the Case

This is an Administrative Procedures Act review and declaratory judgment action, in which Plaintiff-Appellant William Akins seeks review of a Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”) action that declared a device invented by Akins to be a machine gun. In the alternative, Akins seeks a declaration that the statute defining a machine gun (26 U.S.C. § 5845(b)) is unconstitutional as applied to him.

Proceedings Below

Appellants commenced the action below, in the United States District Court for the Middle District of Florida on May 21, 2008, against the United States. The action arose out of a series of actions of the BATFE regarding a device invented by Akins, the “Akins Accelerator.” BATFE classified it as a “nothing,” following which Akins began commercial production of the Akins Accelerator. BATFE then declared it (internally) to be a machine gun, and claims to have evaluated it subsequently to support its declaration. Thereafter, BATFE publicly declared it to be a machine gun and ordered Akins to cease its distribution. The District Court granted the government’s motion for summary judgment, and this appeal follows.

Statement of the Facts¹

Plaintiff invented a device he patented in August of 2000 that he later called the Akins Accelerator. The purpose of the Akins Accelerator is to replace the stock of a host firearm, a semiautomatic rifle, and through controlled “bump firing,”² increase the rate of fire of the semiautomatic rifle while maintaining aiming accuracy. Traditional methods of bump firing have two drawbacks that result in dissatisfaction to the shooter. First, it can be difficult to keep the proper and consistent forward force on the firearm with the shooter’s non-dominant hand. Second, it can be difficult to keep rearward tension in the trigger finger without actually moving the finger

¹ Because this appeal concerns the District Court’s grant of a defense motion for summary judgment, the evidence must be viewed in a light most favorable to the plaintiff (Akins). *Stanton v. Larsh*, 239 F.2d 104, 106 (5th Cir 1956). The statement of facts therefore draws largely on the Complaint and on the Statement of Disputed Facts filed by Akins in opposition to the government’s motion.

² “Bump firing” is a term used to describe a method of achieving rapid firing of a semiautomatic firearm. The theory behind bump firing is that the recoil of the firearm forces the firearm to move rearward and disengage the trigger from the shooter’s trigger finger (thus resetting the trigger for another shot through the normal operation of the firearm), while forward tension is applied to the firearm (such as by the left hand of a right-handed shooter), resulting in the firearm (and trigger) being forced forward again and causing the trigger to be “pulled” by the tension in the shooter’s finger. If done well, the result is that the firearm achieves firing rates equivalent to those of fully automatic weapons. The crucial aspects of bump firing are 1) the shooter must maintain tension in his trigger finger (so that the forward motion of the firearm and trigger meet the resistance of the finger and cause another shot to fire), and 2) forward pressure on the firearm (such as by the non-dominant hand) to counteract the rearward motion caused by the recoil.

rearward (and thereby “follow” the trigger and not allow it to move forward to reset for another shot). Even when these obstacles are overcome, the resulting back and forth movement of the firearm tends to be non-linear and accuracy cannot be achieved.

The Akins Accelerator solved all these problems. The Akins Accelerator is a replacement stock for the host firearm.³ Not a conventional stock, the Akins Accelerator allows the Ruger 10/22 (minus the factory stock) to move in a linear motion forward and rearward. An internal spring applies a force that holds the Ruger 10/22 in its most forward position when the assembly (the Akins Accelerator and Ruger 10/22 together) is at rest. When the rifle is fired, the recoil of the shot overcomes the force of the spring and the Ruger 10/22 moves rearward inside the Akins Accelerator while the shooter’s hands hold only the Akins Accelerator.

As the energy from the recoil compresses the spring even farther, the force of the spring counteracts the recoil and pushes the Ruger 10/22 forward again. During the recoil operation, the spent shell is ejected and

³ The production model of the Akins Accelerator was made for a single host firearm: the popular Ruger 10/22 semiautomatic .22 caliber rifle. The theory of operation, however, could be used in a variation adapted for virtually any semiautomatic firearm. For simplicity’s sake, the host firearm will be referred to as a Ruger 10/22.

another live round of ammunition is put in the firing chamber of the Ruger 10/22 (these actions take place normally on a factory Ruger 10/22).

The second innovation on the Akins Accelerator is that it has finger stops for the trigger finger. When the assembly is fired, the trigger finger pulls the trigger rearward until the finger encounters a stop located slightly to the rear and on either side of the trigger. Thus, when the assembly is properly adjusted, the trigger finger can move rearward just far enough to fire the rifle before the finger is stopped by the finger stops. Then, as the rifle moves rearward (due to the recoil discussed above), the trigger “disappears” between the finger stops and moves inside the Akins Accelerator, losing contact with the trigger finger. The shooter thus can maintain tension against the finger stops, which counter the tendency of the finger to follow the trigger rearward.

Finally, as the rifle moves forward again due to the forward tension supplied by the spring, the trigger re-engages the trigger finger. Because the shooter maintains rearward pressure in the trigger finger, the trigger is “pulled” again (actually pushed into the finger), and the rifle fires. To summarize, a properly adjusted assembly (Ruger 10/22 and Akins Accelerator) will bump fire rapidly while achieving higher accuracy than is possible with other means of bump firing.

Plaintiff saw the market value in the Akins Accelerator, but wanted to ensure that there was no question regarding its status as not regulated by the federal government. Plaintiff is not licensed to manufacture firearms, including machine guns, and *had no interest in entering that industry*. Plaintiff obtained an opinion letter from a nationally-recognized firearms attorney that the Akins Accelerator was not a machine gun, or a firearm at all, subject to federal regulation. In March 2002, he forwarded this letter, along with a copy of his patent, to the Firearms Technology Branch (“FTB”) of the U.S. Department of Justice’s Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”), asking for a classification of the device.⁴

When FTB had not replied to his request 15 months later, Plaintiff sent a second, substantially similar request in June 2003. In July 2003, FTB responded to the first request, asking for a sample to test and inspect. Eleven days later, Plaintiff’s business associate, Tom Bowers, sent a sample to FTB. In October 2003, FTB responded to Plaintiff’s second request, asking for a sample to test and inspect. Because he already had submitted a sample, Plaintiff did not respond to the October letter.

⁴ FTB routinely classifies devices for anyone requesting a classification.

In November 2003, FTB responded to Mr. Bowers that it had inspected the sample and tested it on a host firearm.⁵ Although FTB said the sample did not operate as intended, FTB nonetheless concluded, “Our examination has determined that the submitted stock assembly does not constitute a machinegun as defined in the NFA [National Firearms Act].”

The November letter left an ambiguity: was the device not a machine gun because it did not function properly, or was it not a machine gun even if it functioned as intended? To resolve all doubts, Mr. Bowers called FTB and later wrote (in January 2004) regarding this issue. FTB responded later that month with, “Our classification of the stock assembly was rendered despite the fact that the screws dislodged from the frame. The theory of operation was clear even though the rifle/stock assembly did not perform as intended. In conclusion, your prototype shoulder stock assembly does not constitute a “machinegun” as defined in the NFA.”

Satisfied with legal advice and two letters from the government that the Akins Accelerator was not a machine gun, Akins invested his life

⁵ The sample provided was made for an SKS-type semiautomatic rifle. As noted above, however, the theory of operation can be applied to virtually any semiautomatic host firearm and is not dependent on the specific type of firearm. Contrary to the District Court’s opinion, manufacturing the Akins Accelerator for varying host firearms does not constitute “changes to the practical operation of the device.” The practical operation of the Akins Accelerator would be identical for any host firearm for which it was made.

savings into moulds, manufacturing capabilities, and marketing necessary to go into commercial production and sale.⁶

When Akins ultimately entered the market with the Akins Accelerator in 2006, initial response to the product was enthusiastic. On his way to recovering his investment and turning a profit, Akins' success was destined to be short-lived.

On August 16, 2006, Sterling Nixon, the Chief of FTB wrote an internal email saying:

Two companies are manufacturing machineguns.... The firearms are using the motion of the weapon to move the finger back and forth. ***FTB has always evaluated these devices as machine guns.*** One of the manufacturers sent us a sample that did not function. We classified it as nothing. The manufacturer then changed the device and made it function and is now selling it on the internet.... I have been talking to James Vann and Teresa Ficaretta [two ATF lawyers]. ***We feel that ATF needs to put a stop to the sales ASAP. In order to make a legal case, FTB needs to evaluate these machineguns.***

(Emphasis supplied). The subject heading in Mr. Nixon's email was "Illegal machine guns." In that email, Mr. Nixon included an email from Daniel Pinckney, of the National Firearms Act Branch of the ATF, which said, "I guess by the current definition of a machine gun, it technically isn't one, but

⁶ At the time of production, the Akins Accelerator was manufactured and sold by a corporation, Akins Group, Inc. Akins is the successor in interest to this dissolved corporation, so no distinction is made between actions taken by Akins personally or by the corporation.

it sure has a pretty quick rate of fire.” Within a week, ATF emails from coast to coast had subject headings of “Akins machinegun.” By September 8, 2006, ATF “conferred with counsel ... and determined [the Akins Accelerator] to be a machinegun. *When our technical review is complete*, it will be forwarded to counsel with a recommendation that any sold should be recalled.” (Emphasis supplied).

On September 22, 2006, two weeks after ATF already had “determined it to be a machinegun,” ATF ordered an Akins Accelerator from Plaintiff (ATF did not identify itself as such when ordering the device). On October 31, 2006, ATF lawyer Ficaretta began trying to schedule a meeting “to discuss the classification” of the Akins Accelerator. At some point after this, an undated internal ATF memo says, “*The marketed device was radically different from the prototype* that was previously submitted. On further review and test fire, FTB determined that the operating principle was that of a machinegun.” (Emphasis supplied).

On November 22, 2006, FTB sent Akins a letter advising him that the Akins Accelerator had been classified as a machine gun. Contrary to the recent internal memo, the letter said, “*[T]he theory of operation of the prototype and the Akins Accelerator is the same.*” (Emphasis supplied). In the letter, ATF equated “function of the trigger” with “pull of the trigger.”

On December 13, 2006, ATF issued a rulemaking, ATF Rul. 2006-2, declaring a device exactly meeting the description of the Akins Accelerator to be a machine gun. The rulemaking also equated “function of the trigger” with “pull of the trigger.” ATF did not publish a notice of proposed rulemaking or seek comments pursuant to 5 U.S.C. § 553.

On February 6, 2007, Akins’ counsel wrote ATF asking that it reconsider its ruling. The letter informed ATF that it had evidence of errors on ATF’s part. Subsequently, Akins’ counsel made multiple requests for a hearing on the subject. ATF ultimately denied reconsideration and declined to hold a hearing.

ATF determined that the spring was the part that made the Akins Accelerator a machine gun. Thus, it required Plaintiff to remove the springs from his inventory of Akins Accelerators. Plaintiff likewise was required to provide ATF with a customer list, and ATF required purchasers of Akins Accelerators to remove the springs. All removed springs were seized by ATF. Now classified as machine guns, there no longer is a market for Akins Accelerators. Plaintiff was forced to close down his company and cease production and sales, leaving him in financial ruin.

In an undated internal memo apparently written after the events described above, FTB Assistant Chief Richard Vasquez distinguished the Akins

Accelerator from other devices because the shooter, he said, only has to have a single “initial conscious effort to pull the trigger.” (Emphasis in original). He went on to say the “firearm continues to fire without interruption until a second, **conscious** releasing of the trigger stops the firing sequence.” (Emphasis supplied). In the same memo, Mr. Vasquez retreated from the public position of the ATF by saying, “[I]t is FTB’s opinion that ‘function’ is the best description and does limit ATF to a narrow definition such as ‘pull only.’”

Statement on the Standard of Review

The District Court’s grant of summary judgment is reviewed *de novo*, applying the same legal standards as the District Court, and viewing all facts and reasonable inferences therefrom in the light most favorable to the non-moving party. *Arrington v. Helms*, 438 F.3d 1336, 1341 (11th Cir 2006).

Summary of the Argument

The District Court granted Appellees' Motion for Summary Judgment based on "facts" that are not support on the record, and in disregard of the fact that the BATFE exhibited blatant bias against Akins and that BATFE did not provide the complete record for review. The District Court also ignored the genuine dispute of material fact apparent in the record. Finally, the District Court excused to Akins' detriment the government's failure to abide by the District Court's orders, and the District Court needlessly shortened the time for Akins to respond to BATFE's Motion. For the foregoing reasons, the judgment of the District Court should be reversed.

Argument and Citations of Authority

There is a Genuine Dispute of Material Fact

Astonishingly, the District Court came to the conclusion that there was no dispute of fact, and that Akins has not raised any such dispute. In the *very first paragraph* of the Complaint, however, Akins alleged that the BATFE's actions "were without factual support." R1-1. Moreover, Akins filed a multi-page Statement of Disputed Facts in response to the government's Motion. R1-25. The District Court failed to acknowledge this aspect of Akins' case. Likewise, the District Court made no attempt to reconcile the Statement of Disputed Facts with the positions of the government.

For example, Akins asserts that the trigger on a rifle mounted in an Akins Accelerator "must be functioned for each and every shot fired." R1-25(2)-5. The government contends the rifle fires automatically with a single function the trigger.⁷ The pre-litigation events underscore this factual dispute. Given that BATFE understood the operation of the Akins Accelerator it initially classified, it must have understood the facts attendant

⁷ The government appears to make this particular assertion in its brief on its Motion. R1-19-6. The government failed to file a statement of facts as required by the District Court's Scheduling Order. R1-18-2. This deficiency is compounded by the fact that BATFE made no findings of fact for inclusion in the record. It is thus difficult to cite with specificity to the facts asserted by the government.

with that operation. That is, the rifle fired once for every function of the trigger. If BATFE thought otherwise, it surely would have classified the device as a machine gun. This discrepancy begs the question: Was BATFE wrong about the facts in 2003 or was it wrong about the facts in 2006? Because the record supports either conclusion, it is impossible to determine on the record which is correct.

The District Court also made several factual statements that are disputed (and thus requiring a trial to reconcile) or not supported in the record at all. In the very first line of its Discussion, the District Court declared that the BATFE “concluded that the Akins Accelerator is a machinegun based on its testfiring of a retail-model Akins Accelerator.” The record shows otherwise. The Chief of the Firearms Technology Branch determined that the Akins Accelerator was a machine gun without any testing or inspection at all. In fact, he made the determination that it is a machine gun base on his review of videos posted on the internet. R1-19(3)-24. Only after he made this determination did he order his staff to build a legal case to support his meritless conclusion. *Id.*

The District Court also assigns a “failure to dispute” to Akins that Akins never had occasion to dispute. The District Court found that Akins “does not dispute that the purpose of the Akins Accelerator is to make it

possible for the shooter to act once and cause the rifle to fire repeatedly until its ammunition is exhausted ...*or until the shooter takes an action to remove his finger from the device.*” R1-29-10 [emphasis supplied]. The District Court’s citation to the Statement of Disputed Facts, to support that conclusion, is inaccurate. No where does the government assert this fact, so it would have been odd for Akins to dispute something that no one posited. Quite the contrary, Akins gives a rather lengthy explanation of the purpose and operation of the Akins Accelerator, but no where does he claim the purpose cited by the District Court.

The District Court’s finding of fact that partially drives the ultimate conclusion (that the Akins Accelerator is a machine gun) is derived from an undated internal BATFE memo that appears to have been written after the re-classification of the Akins Accelerator had been made. (“FTB determined that ‘the person firing has to make one initial conscious effort to pull the trigger and once the triggering cycle is initiated, the firearm continues to fire without interruption until a second, conscious releasing of the trigger stops the firing sequence.’”) R1-29-10, citing to R1-19(4)-59.

The reason the memo appears to have been written after the fact is that it makes reference to issues “that were presented by Mark Barnes with respect to the Akins Accelerator.” R1-19(4)-57. Mark Barnes was Akins’

attorney who wrote BATFE a letter on February 6, 2007, seeking reconsideration of the November 22, 2006 re-classification of the Akins Accelerator. In order for the internal BATFE memo to have addressed the 2007 letter, the memo must have been written after the 2006 re-classification.

The District Court should not base any finding of fact on an internal memo written after the fact to bolster BATFE's case. One could just as easily make findings of fact by citing to Mr. Barne's 2007 letter, which said, "For each shot, the pressure is released as the trigger moves rearward, and when the trigger thereafter moves forward, it is pulled again." R1-12-27.

The District Court was thus faced with diametrically conflicting facts, and impermissibly chose one over the other. A motion for summary judgment cannot be decided by resolving genuine issues of material fact. Fed. R. Civ. P. 56. In cases where such issues exist, the motion must be denied.

BATFE May Not Change the Meaning of a Criminal Statute Because of Perceived Changes in Technology

The District Court refers to BATFE's "policy" and "views" in interpreting the criminal statute at issue in this case. The District Court seems to have concluded that BATFE is free to criminalize the possession of

any device it does not like by calling the device a machine gun, without regard to whether the device fits the statutory definition. Once the agency makes that determination (even if it gives affected parties no notice that such a determination is in the offing), reasons the District Court, a person in Akins' position is powerless to refute the finding. The District Court accepted, without question, BATFE's determination that the Akins Accelerator is a machine gun, reasoning that the BATFE may change its "views" and "policy" regarding criminal statutes to keep up with technology.

The District Court does not attempt to identify the supposed change in technology. Indeed, there was no such change. The District Court appears to place great emphasis on the fact that the original prototype submitted to BATFE was for a high-powered military-type weapon, an SKS rifle (the "precursor" of the AK-47), but that the commercial Akins Accelerator was for a common, low-powered .22 caliber rifle. This is no change in technology. The technology of the Akins Accelerator is not dependent on the host firearm. The Akins Accelerator could be manufactured for virtually any semiautomatic rifle. Moreover, the local extension of the District Court's opinion is that it would be okay for Akins to revert to the "old technology" and make his device for a much more powerful rifle.

The District Court also notes that BATFE acted to “close a loophole created by its earlier interpretation of the machinegun definition.” When it comes to criminal statutes, a “loophole” is nothing more than legal behavior that someone wishes were criminalized. What congress fails to criminalize cannot be corrected by BATFE. *See, e.g., United States v. Peters*, 403 F.3d 1263, 1275 (11th Cir. 2005), where congress had to modify the law to apply, to persons other than licensed gun dealers, the prohibition against selling guns to felons. In *Peters*, the “loophole” identified by congress was “closed” by congress. BATFE would have had no authority to arrest a non-licensee for violating a criminal provision that only applied to licensees. Likewise, in the case at bar, BATFE has no authority to declare devices that do not fit the statutory definition to be machine guns by changing the words of the statute. This is especially true where, as here, BATFE quickly changed the statute back to its original wording because it did not want to hem itself in with the fabricated definition.

There are no common law crimes in this country, and for good reason. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Only congress can act to include inadvertently omitted in a statute, no matter how salutary the purpose. *Viereck v. United States*, 318 U.S. 236, 243-245 (1943).

“The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach.” *Id.* “While Congress undoubtedly had a general purpose to [act] in the public interest ... we cannot add to [the statute’s] provisions other requirements merely because we think they might more successfully have effectuated that purpose.” *Id.* It is not the place of BATFE to move the boundary between legal and criminal to suit its needs (or desires). A person must be fairly put on notice what conduct is criminalized. If the agency is free to redefine the criminal code, without notice, in order to conform to a bureaucrat’s “views,” then the criminal code is nothing but the whim and caprice of the bureaucrat.

Public Safety is not a Valid Consideration in Interpreting Criminal Law

The District Court concluded that BATFE’s determination that the Akins Accelerator is a machine gun is “supported by ... the need to protect public safety.” R1-29-11. The District Court did not elaborate on how it came to this conclusion, other than to state, without citation to the record, that “weapons with a high rate of fire are extremely desirable to criminals.” R1-29-17. The District Court, however, has no authority to declare something to be criminal in the name of public safety. *Viereck*, 318 U.S. at 245 (“[M]en are not subjected to criminal punishment because their conduct

offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law.”)

It likewise is improper to equate “weapons with a high rate of fire” with “machine guns.” As noted by Akins in his Brief to the District Court, congress could have elected to make “rate of fire” a factor (or even the sole factor) in determining if a device is a machine gun. It declined, however, to do so. As a result, many firearms (either standing alone or with after-market accessories) achieve very high rates of fire (just as the Akins Accelerator does), yet they are not machine guns. For example, the BMF Activator, a device consisting of a crank inserted into the trigger guard of a Ruger 10/22 (the same rifle for which the commercial version of the Akins Accelerator was produced) reported results in the rifle firing several hundred rounds per minute, yet the BMF Activator has been determined by BATFE not to be a machine gun. R1-25-15.

BATFE agents have testified that “trigger activators” (which are not machine guns) “involve using springs that force the trigger back to the

forward position, meaning that you have to separately pull the trigger each time you want to fire the gun, but it gives the illusion of functioning as a machine gun.” *Camp v. United States*, 343 F.3d 743, 745 (5th Cir 2003). Thus, the District Court’s reliance on the rate of fire as being significant is erroneous. It also is noteworthy that the Akins Accelerator performs exactly the function described by BATFE as a “trigger activator.”

Moreover, the Supreme Court has rejected the concept of “dangerousness” as a measure of whether a person knew a particular device was a machine gun. *Staples v. United States*, 511 U.S. 600, 618 (1994) (noting that all guns are “dangerous” and half of all U.S. households contain them, so a person would not equate dangerousness of a gun with illicit behavior in owning one).

The District Court’s Decision was Contrary to Law

The District Court erroneously accepted BATFE’s on again/off again equating of a single “function” of the trigger with a single “pull” of the trigger. For support of BATFE’s position, the District Court repeats BATFE’s citation to *Staples v. United States*, 511 U.S. 600, 603 FN 1 (1994), where the Court described a fully automatic weapon as one “that fires repeatedly with a single pull of the trigger.” The District Court cites

this quote as authority that the Supreme Court equates “pull” with “function.”

That is not the holding in *Staples*. No where is *Staples* was their an issue of whether “pull” means “function.” The only trigger function of interest in *Staples* was pulling, and no distinction was made with any other function. This is also true of the only other case cited by the District Court, *Camp*, 343 F.3d at 743. In *Camp*, the court found that a switch on an electric motor that in turn operates the factory “trigger” on a firearm is a “trigger” for the purpose of 18 U.S.C. § 5845. In *Camp*, one coincidentally pulled the switch (as opposed to pushing or performing some other function). Under the District Court’s view, Camp could have avoided criminal liability for possessing a machine gun if he had made the switch a push-button switch. This absurd interpretation flies in the face of common sense. *See, e.g., United States v. Fleischli*, 305 F.3d 643 (7th Cir 2002), where the court described an “application” of the trigger, no doubt because the electrical switch in that case is “pushed” and not “pulled” as in a conventional firearm.

The District Court also cites to the testimony before Congress of the NRA president in 1934 to support an interpretation of a law passed in 1934 that is first applied by BATFE in 2006. R1-29-12. The District Court does

not question why the BATFE took 72 years to adopt an interpretation of law based on a snippet of testimony buried in the congressional record by a non-member of Congress. Again, there is no indication that there was a debate during the testimony of a distinction between “pull” and “function.” In any event, Congress adopted the word “function,” and not “pull.”

Finally, as noted above, BATFE quickly retreated from its use of “pull” in the place of “function” after the one-time use of the narrow term against Akins. In an internal memo, BATFE noted that using “pull” instead of “function” would result in boxing the BATFE in unnecessarily. It is difficult to take BATFE’s use of the term “pull” seriously when it abandoned that use before the ink was dry on BATFE’s abuse of Akins.

The District Court Decided the Case on an Incomplete Agency Record

Akins noted in his brief to the District Court that the “record” filed by BATFE was full of redactions (107 pages) and deleted pages (49 pages), without explanation. R1-25(1)-4. The government excuses its incomplete record by incorrectly (and without factual support) claiming that “Plaintiff has been furnished with a privilege log explaining the reasons for these redactions....” R1-28-2.

The government first asserted the existence and service of a privilege log (again, without citation to an affidavit or other source) in its Reply Brief,

which the District Court permitted the government to file over Akins objection. R1-27. To be clear, counsel for Akins hereby certifies to this Court that he has received no such privilege log. Moreover, an agency's failure to claim a privilege "with respect to certain documents ... could be construed as a waiver of its claim to privilege." *Tafas v. Dudas*, 530 F.Supp.2d 786, 801 (E.D. Va. 2008).

Even if such "privilege log" had been received, however, that would not end the inquiry. The *Tafas* opinion makes clear that the burden is on the government to prove the validity of the privilege asserted. *Id.* Mere assertion in a privilege log is not proof. A privilege log is only the government's assertion of the privilege. Akins still retained, if he had received a privilege log, the right to object to the assertion of the privilege as to specific documents. By failing to provide the privilege log, however, the government both waived the privileges that might have been asserted and deprived Akins of an opportunity to object to any such asserted privileges. The District Court erroneously found, however, that BATFE provided Akins with a privilege log. R1-29-9. This finding apparently was based on the unsupported claim in BATFE's Brief that it had done so.

Aside from the materials that BATFE redacted from the record, the record is remarkable for what it does not contain. No where in the

voluminous record of documents and video files is there even a single page of a report or documentation of BATFE's inspection and testing of the Akins Accelerator. Astonishingly, the record does contain video testing of five devices *other than the Akins Accelerator*. Lacking any record evidence, BATFE still concluded *ipse dixit* that the Akins Accelerator is a machine gun. The District Court accepted this conclusion with no citations to any reasoned, fact-based conclusions.

BATFE's failure to support its conclusions with articulable facts is not novel:

This court routinely defers to administrative agencies on matters relating to their areas of technical expertise. We do not, however, simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment. In order to survive judicial review in a case arising under § 706(2)(A), an agency action must be supported by reasoned decision making. Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope and authority, are not supported by the reasons that the agencies adduce.... We therefore owe no deference to ATFE's purported expertise because we cannot discern it."

Tripoli Rocketry Association, Inc. v. B.A.T.F.E., 437 F.3d 75, 76 (2006).

"The agency has never provided a clear and coherent explanation for its classification.... ATFE has never articulated the standards that guided its analysis." *Id.* At 81.

BATFE Showed Bias Against Akins

Imagine a district court judge in Atlanta taking a lunchtime walk near Five Points, where he spots a street vendor selling Nike sneakers for \$50 per pair. Thinking this to be an unbelievably low price, he sends an email to the Marshal's office, saying, "Someone is selling counterfeit sneakers at Five Points. We need to stop those sales ASAP. In order to make a legal case, I need to inspect a pair of these counterfeit shoes." The marshal buys a pair of shoes and brings them to the judge. The judge sends the shoe seller a letter concluding that the shoes are counterfeit, together with an injunction prohibiting any further sales of the tennis shoes. There was no hearing, and the shoe man did not even know the judge was "investigating" the shoes. The shoe man appeals, and the record on appeal consists of the email to the marshal and the letter and injunction. Is there any possibility the injunction would be affirmed?

Akins showed in his Brief that BATFE displayed blatant bias against his device. The Chief of the Firearms Technology Branch wrote an internal email, *before it ever inspected or tested the Akins Accelerator*, in which he said, after describing the history of the device, "We feel that ATF needs to put a stop to the sales ASAP. In order to make a legal case, FTB needs to evaluate these *machineguns*." [Emphasis supplied]. R1-19(3)-24. The

subject heading in the email was “Illegal machine guns.” *Id.* Thus, the Chief of FTB determined the Akins Accelerator was an “illegal machine gun” before his branch had inspected or tested it. He then directed his staff to “build a legal case” to support his biased conclusion. Not surprisingly, his branch ultimately concluded that the device was a machine gun.

Later, a BATFE employee said in an email, “We evaluated the device and conferred with counsel (9/8/06) and determined it to be a machine gun.” R1-19(4)-3. This email shows that BATFE “evaluated the device” and “conferred with counsel” *two weeks before* it ordered the Akins Accelerator for testing on September 22, 2006. R1-19(3)-54, 55. This was *33 days before* the field office that purchased the Akins Accelerator sent it to FTB for examination. R1-19(3)-54. Thus, the agency confirmed the conclusions of the FTB Chief before it ever saw the device.

[D]ue process requires a neutral and detached judge in the first instance.... That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation...which might lead him not to hold the balance nice, clear, and true.

Concrete Pipe & Products v. Construction Laborers and Pension Trust, 508 U.S. 602, 617 (1993). It is clear in this case that the FTB Chief’s thumb

was on the balance before any measurements took place. With the bias shown against Akins (seeking to “stop sales ASAP” before any adjudication had taken place), this agency should have disqualified itself in the first instance.

The District Court did not address this important issue raised by Akins in his brief. BATFE did not attempt to rebut Akins’ claim of bias when it filed a reply brief. Due process requires that the agency’s classification be reversed, with the matter re-evaluated by a neutral party.

Akins was Constitutionally Entitled to a Hearing Because He Contested the Factual Basis for BATFE’s Finding a Device to be a Machine Gun

Akins clearly alleged in his Complaint that BATFE was factually wrong in concluding that the Akins Accelerator is a machine gun. R1-1-9 (“Defendant acted arbitrarily, capriciously, and without factual basis”). Akins showed in his Statement of Disputed Facts that the Akins Accelerator was not a machine gun “because the trigger must be functioned for each and every shot fired.” R1-25(2)-5.

It is clear, therefore, that Akins contends that BATFE “made a mistake of fact, i.e., that [the Akins Accelerator] does not meet the criteria set out in the BATF’s expanded definition of ‘machine gun.’” “[C]onstitutional due process does require a hearing if [the device

manufacturer] contends the agency made a mistake of fact, i.e., that his gun does not meet the criteria set out in the BATF's expanded definition of 'machine gun.'” *York v. Secretary of the Treasury*, 774 F.2d 417, 421 (10th Cir. 1985). Akins, therefore, was constitutionally entitled to a hearing. Although Akins raised this issue in the District Court, the District Court did not address it.

Akins was Entitled to a Predeprivation Hearing Because BATFE's Testing Procedures were Suspect

The *York* test articulated above applies to a ***post-deprivation*** hearing, to which Akins was entitled but did not receive. The District Court focused solely on whether Akins was entitled to a ***pre-deprivation*** hearing. The Supreme Court has established three factors that must be weighed in determining if a party is entitled to a pre-deprivation hearing:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The District Court attempted to weigh these factors. Applying the first factor, the District Court determined that Akins has an important

interest in marketing his invention, but that this interest is lessened by the government's interest in regulating the firearms industry. R1-29-15. In other words, the District Court concluded that the third factor (the government's interest) is not only weighed by itself, but its weight can somehow lessen the weight that ought to be accorded Akins under the first factor.

As grounds for this conclusion, the District Court cited to the Court of Federal Claims' opinion in a takings case Akins brought against the government. R1-29-15. That opinion, however, is not final and no judgment has been entered in that case. Moreover, the opinion rests on the illogic that the Akins Accelerator must be a machine gun (and therefore a "firearm" as that term is used in federal statutes) because the government has a strong interest in regulating firearms. "[A] business owner beginning manufacture of rapidly-repeating firearms 'ought to be aware of the possibility that new regulation might even render his property economically worthless.'" R1-29-15. It ignores the fact that Akins had no interest in manufacturing firearms, rapidly-repeating or otherwise, and scrupulously avoided entering the firearms industry. R1-25(2)-5. Moreover, the District Court observed that if the Akins Accelerator is not a machine gun, it "would not fall under any federal regulatory scheme of any kind." R1-29-18. Thus,

the government's interest in regulating the Akins Accelerator only exists if the Akins Accelerator is a machine gun.

Finally, the District Court ignored the holding of the 10th Circuit Court of Appeals that an actual firearms manufacturer (as opposed to an accessory manufacturer such as Akins) had a strong interest (undiminished by the government's interest) in bringing his device to market. *York*, 774 F.2d at 421.

The District Court also weighed the second factor, the risk of erroneous deprivation, in the government's favor. The District Court concluded that Akins suffered no risk of erroneous deprivation because he was able to write a letter to BATFE *post-deprivation*. R1-29-16. Thus, the District Court determined that there was little risk of erroneous deprivation from lack of a *pre-deprivation* hearing because Akins wrote a lengthy *post-deprivation* letter to BATFE.

The District Court's logic renders the second factor a nullity. Presumably, every federal agency receives mail. It follows, therefore, that any party aggrieved by an agency deprivation could write such agency a letter. If the risk of erroneous deprivation is low because any party can write the agency a post-deprivation letter, then the second factor always weighs in the government's favor. The factor thus has no meaning. A more logical

approach to the second factor is to keep in mind that the *Eldridge* factors apply only to determine whether due process requires a *pre-deprivation* hearing. It stands to reason that nothing that might occur *post-deprivation* can ameliorate the entitlement to a *pre-deprivation* hearing.

Applying the second factor in the language articulated in *York*, we must look at whether “the evidence upon which the government relied to classify the [device] as a machine gun is scientific, engineering data – sharply focused, easily documented and not based to a significant extent upon witness credibility or other subjective determinations.” 774 F.2d at 421. This application of the second *Eldridge* factor necessarily requires raising again the terrific inadequacy of BATFE’s record. There are no data, scientific, engineering, or otherwise, because BATFE failed to report on or document any testing it may have performed on the Akins Accelerator. There is no sharp focus because there are no findings of fact clearly laid out in the record. Witness credibility is paramount, because the record only contains anecdotal accounts and no testimony or objective evidence at all. Finally, the determinations are sensationally subjective, as BATFE apparently made its revised classification based at least in part on the subjective criterion of a “conscious” pull of the trigger. In short, applying

the *York* explanation to the second *Eldridge* factor results in a high risk of erroneous deprivation and therefore it weighs heavily in Akins' favor.

The third and final *Eldridge* test is the government's interest. To be sure, the government has an interest in regulating machine guns. On the other hand, the government has no interest in regulating devices that are firearm accessories (and therefore not firearms at all). Thus, the degree of government interest in this case hinges on the outcome of the case.

It is helpful in this case to see how the government's interest in the case was addressed without a pre-deprivation hearing and what a pre-deprivation hearing would have done, if anything, to frustrate the government's interest. The earliest evidence in the record that BATFE took renewed interest in the Akins Accelerator is when the FTB Chief sent his email on August 16, 2006, declaring the Akins Accelerator to be a machine gun and requesting development of a "legal case." On November 22, 2006 (98 days later), the FTB Chief sent Akins the letter informing him of the revised classification. Thus, while the BATFE built its "legal case" quickly, it did not employ any kind of summary disposition.

If, on the other hand, BATFE had determined on August 16, 2006 that it wanted to revisit its classification of the Akins Accelerator and had informed Akins of that fact, it also could have established a procedural

schedule that could have included a hearing and still resulted in a decision by November 22. It is well within the realm of possibility that BATFE could have given requested a sample for testing, set a hearing within 45 days, required post-hearing briefs within 20 days after that, and issued a decision 30 days after receipt of briefs, for a total of 95 days (three fewer than it actually took BATFE without a hearing). While the government had some interest at stake, therefore, its interest would not have suffered had it made a pre-deprivation hearing available to Akins. The third *Eldridge* factor weighs equally in both parties' favor, at the very least.

The District Court said that BATFE was entitled to a “presumption of validity” and that the standard of review of BATFE’s actions is “exceedingly deferential.” This statement of the general rule overlooks the exception that applies when an agency displays blatant bias against a party.

26 U.S.C. 5845(b) is Unconstitutionally Vague As Applied to Akins

The District Court reached its conclusion based in large part on the fact that Akins conservatively asked BATFE to classify his device before investing his life savings on commercial production. (“[Akins’] own actions in communicating repeatedly with ATF suggest that the statute gave him fair notice that Akins Accelerators *might* well fall within the prohibited standard of conduct. He sufficiently understood the section 5845(b) definition to

submit the device to FTB for classification.”). R1-29-19. [Emphasis supplied].

It is difficult to understand how Akins’ uncertainty about what BATFE might think makes the statute at issue not vague. As the District Court noted, “a statute is not unconstitutionally vague unless it is substantially incomprehensible and men of common intelligence must necessarily guess at its meaning.” R1-29-18, *citing Cotton States Mutual Insurance Co. v. Anderson*, 749 F.2d 663, 669 (11th Cir. 1984) (internal quotation marks omitted).

In this case, BATFE asserts (and the District Court accepts) that “single function of the trigger” really means “single conscious pull of the trigger” and “release” really means “conscious release.” BATFE also asserts that “trigger is released” really means “shooter stops allowing the trigger to be pulled repeatedly.”

It is incomprehensible that the words take on the meaning ascribed by BATFE and accepted by the District Court. Akins would have had to guess (and guess wildly) to come up with those definitions. Moreover, BATFE never applied those definitions when it classified the Akins Accelerator the first time. It would have been even more outlandish for Akins to have guessed at these revised definitions *before* BATFE came up with them.

There simply is no way a person of ordinary intelligence would have guessed that the words have suddenly taken on the meanings now given them by BATFE.

The District Court Ignored Akins' Declaratory Judgment Action

The District Court only considered this case from the standpoint of an APA review of BATFE's actions. The District Court ignored the fact that Akins also brought a declaratory judgment action against the government. In that respect, Akins is seeking a declaration that the Akins Accelerator is not a machine gun and therefore not a firearm at all. Under 28 U.S.C. § 2201, courts of the United States have jurisdiction to declare the law in "case of actual controversy." The controversy between the United States and Akins is clear. The government insists the Akins Accelerator is a machine gun and would subject anyone possessing one to arrest and prosecution. Akins desires to resume production and sales and also wishes to possess them for his own personal use, but he is in fear of arrest and prosecution for doing so.

Akins seeks to resolve this controversy. Because the government chose not to afford Akins an opportunity for a hearing on the subject (having made its reclassification without even advising Akins that it was conducting

an “investigation”), the matter has not been adjudicated between the parties. Akins is entitled to a decision on his declaratory judgment action.

Conclusion

The District Court erred by ignoring the genuine issue of material fact (whether the Akins Accelerator fires “automatically” with a single “function” of the trigger). Resolving the facts in a light most favorable to Akins (the non-moving party), the government was not entitled to summary judgment. The District Court’s interpretation of the word “function” to mean “pull” was contrary to law. The District Court also ignored BATFE’s blatant bias against Akins and failed to address this and many other issues raised by Akins. For these and other reasons, the decision of the District Court must be reversed.

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Certificate of Compliance

I certify that this Brief of Appellant complies with Rule 32(a)(7)(B) length limitations, and that this Brief of Appellant contains 8,450 words as determined by the word processing system used to create this Brief of Appellant.

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Certificate of Service

I certify that I served a copy of the foregoing Brief of Appellants via U.S. Mail on November 19, 2008 upon:

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Docket No. 08-15640-F

**The United States
Court of Appeals
For
The Eleventh Circuit**

**William Akins, Appellant
v.
United States of America, Appellee**

**Appeal from the United States District Court
For
The Middle District of Florida
The Hon. Richard A. Lazzara, District Judge**

Reply Brief of Appellant

**John R. Monroe
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Akins v. United States, No. 08-15640, C 1 of 2

Amended Certificate of Interested Persons

Appellant certifies that the following is a complete list of persons and entities that are known to him to have an interest in the outcome of this case. Please take note that the names in ***bold italics*** are additions from all previous certificates filed by the parties and *amici*:

Akins, William

Albritton, A. Brian

Bagley, Nicholas

Gun Owners Foundation

Gun Owners of America, Inc.

Katsas, Gregory G.

Lazzara, Hon. Richard

Loesch, Sheryl

Miles, John S.

Monroe, John R.

Morgan, Jeremiah L.

Olson, William J.

Parrish, Paul

Rudy, John F.

***Akins v. United States*, No. 08-15640, C 2 of 2**

Soskin, Eric

Stern, Mark B.

Titus, Herbert W.

United States of America

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Summary of the Argument

The government fails to show that the District Court acted properly in granting the government's motion for summary judgment. The government continues to misstate the facts regarding the Akins Accelerator and to fail to adhere to the definition of "machine gun" established by Congress. Because the ATF acted unreasonably, inconsistently, and contrary to law, the judgment of the District Court should be reversed.

Argument and Citations of Authority

The ATF Did Not Act Reasonably

1. The ATF is not Entitled to Deference

The government begins its argument by claiming it is entitled to *Chevron* deference, relying in part on *Gun South, Inc. v. Brady*, 877 F.2d 858, 864 (11th Cir. 1989). In *Gun South*, the ATF imposed a temporary suspension on importation of certain rifles, in contravention of licenses it had issued previously to Gun South to import those rifles. This Court found the *temporary* suspension reasonable, partly because “The Government has further reassured the court that it will not revoke GSI’s permits without giving GSI the right to participate in a hearing.” 877 F.2d at 868. There also were stated exigencies (keeping certain rifles out of the country).

Here, the government has *permanently* destroyed Akins’ previously-determined right to manufacture and distribute Akins Accelerators. And, the government vigorously denies Akins a hearing. This Court in *Gun South* reasonably deferred to the ATF’s temporary action in a matter (importation of firearms) over which it is given specific congressional authority [18 U.S.C. § 925(d)] when it was given assurance that a hearing before the agency was forthcoming. No such assurances exist here, nor are there any exigencies (Akins already was producing and distributing the Akins

Accelerator at the time of the ATF's actions, based on ATF's twice approval of the Akins Accelerator).

It also is important to note that the ATF is a law enforcement agency, not just an administrative agency. When it comes to classifying devices as machine guns, there is no administrative purpose in doing so, only a law enforcement purpose¹. Law enforcement is not entitled to any deference as to what behavior is criminal and what behavior is not. Congress determines what behavior is criminal, and courts interpret that determination.

The Supreme Court has determined that a factor in weighing the extent of deference to which an agency is entitled is “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking in power to control.” *SEC v. Sloan*, 436 U.S. 103, 117 (1978). Akins has consistently argued that the ATF's consideration evidences no thoroughness. At the heart of this case is whether the Akins Accelerator is a machine gun. It is self-evident that an agency endeavoring to make such a determination would inspect, test, and document its findings.

¹ When it still was legal for citizens to purchase new machine guns (i.e, before 1986), there was a taxing purpose in making classifications. Now that new machine gun purchases are banned for general citizens, classification of new devices as machine guns only has a law enforcement purpose.

While such documentation might come in many forms one would expect to see some kind of report written by a staff scientist or other expert. One also might expect the report to be thorough enough for anyone with sufficient knowledge and equipment to duplicate the tests performed (and presumably duplicate the results).

2. The ATF did not Document Tests Done (If Any) on the Akins Accelerator

The record is completely devoid of any documentation of inspection or testing. Remarkably, the record contains more thorough testing of *other* devices besides the Akins Accelerator. For reasons only the ATF could explain, the ATF's administrative record of its determination that the Akins Accelerator is a machine gun contains video testing of the ATF's testfiring of the "GAT Trigger," the "BMF Activator," the "TAC Trigger," the "Hellstorm 2000," and the "Autoburst." There is no documentation of any kind in the record of any testing done on the Akins Accelerator. Presumably the ATF included this video testing of other devices in the administrative record because it was comparing these other devices to the Akins Accelerator, yet no such comparison exists in the record. Curiously, none of the aforementioned devices has been determined by the ATF to be machine guns.

Also of interest is that the ATF made no consistent effort to try to maximize the rate of fire of any of the devices in the video and likewise made no effort to measure the rate of fire. For example, it is apparent from the video of the GAT Trigger that it could fire much faster than the video demonstrates, but the tester turned the crank slowly so as to illustrate the operation of the device without maximizing its capabilities. And, the video of the BMF Activator shows a 10-round magazine in a Ruger 10/22 being emptied in approximately one second, indicating a firing rate of approximately 600 rounds per minute. [“Test 2” of the BMF Activator, approximately six minutes and 40 seconds into the test video filed as part of the administrative record]. Again, this is not a machine gun even by the ATF’s reckoning.

The ATF also is inconsistent in its classification of the Akins Accelerator compared to earlier decisions. The ATF describes the Autoburst as “keeping the spring tension on the rear of the trigger so that when a first shot is pulled the trigger is pushed back forward simulating a recoil operated bump fire condition that can be obtained without any device, but some devices will aid that method of firing....” [ATF video from approximately 12:45 to 13:07.] Again, the Autoburst is not considered by the ATF to be a

machine gun, even though this description of the Autoburst applies equally well to the Akins Accelerator.

3. The ATF's Re-Classification Lacks Consistency

Moreover, the ATF is not even being consistent with its own earlier classification of the Akins Accelerator. Although nothing changed in the description or operation of the device, the ATF ruled in 2003 that the Akins Accelerator is not a machine gun, and thereafter it ruled in 2006 that it is a machine gun. Thus, in 2006 the Akins Accelerator was a machine gun even though in 2003 it was not. In 2006 spring-assisted recoil bump firing devices were machine guns and in 2002 (and 2004) they were not.

4. The ATF's Reasoning is Invalid

The last factor listed in *SEC v. Sloan* is the validity of the agency's reasoning. In the instant case, the ATF apparently reached its conclusion that the Akins Accelerator is a machine gun by changing the word "function" to "pull" in the statute and by equating high rate of fire with machine gun (despite the utter lack of such a test in the statute).

The ATF defends its use of "pull" in place of "function" by relying on sources that use "pull" in place of "function" in circumstances where the only function of interest is the pull of the trigger. Government Brief at 13. ATF cannot cite a single source of any kind where "pull" is used in place of

“function” but where a different result would have been obtained if “function” were used. Brief of *Amicus Curiae*, pp. 7-13. That is, in every context cited by the ATF, it was irrelevant whether “pull” or “function” were used. Moreover, the ATF now concedes that “function does not limit ATF to a narrow definition such as ‘pull only.’” Government Brief at 16. The ATF nevertheless insists on using “pull only” when discussing the Akins Accelerator.

To be clear, Akins is not claiming that a pull of a trigger is not *a* function. He is claiming that the pull of a trigger is not the *only* function. In a “conventional” machine gun, the shooter pulls the trigger back and holds it back while the firearm fires automatically. That is, the only trigger function is that it is pulled.

With the Akins Accelerator, however, the shooter pulls the trigger and then the trigger moves rearward, disengages from the shooter’s finger, moves forward again, engages the shooter’s finger, being pulled/pushed (a matter of perspective in any context) by the shooter’s finger so that it fires again. R1-25(3)-4.

So, for each shot of the rifle, the trigger is pulled (or pushed) only once, but it also moves rearward and forward again for each shot. With the Akins Accelerator, a single shot is fired with *multiple* functions of the

trigger. It cannot be said that the rifle fires more than one shot with a single function of the trigger.

5. Rate of Fire is not a Valid Basis Upon Which to Classify Devices

Finally, as mentioned earlier, there is no statutory basis for determining whether a device is a machine gun by referring to rate of fire. Many devices that shoot rapidly (such as the gatling gun from old Western movies, as well as the BMF Activator) are not machine guns, but a firearm need only fire twice (even if it fires only twice) with a single function of the trigger to be a machine gun.

The ATF defends its decision by saying it “reasonably concluded that the device, which is designed to permit a shooter to pull the trigger of a semi-automatic rifle a single time and expel a continuous stream of bullets at a rate of approximately 650 rounds per minute, comes within the compass of [26 U.S.C. § 5845(b)].” Government’s Brief at p. 13. Again, however, the government characterizes the facts contrary to what is in the record. If one were to re-write that sentence with facts that demonstrably are in the record, it would be:

The ATF *unreasonably* concluded that the device, which is designed to be a “trigger activator,” which the ATF has consistently held are not machine guns, and with which the trigger functions multiple times for each shot fired, thereby achieving a rate of speed that the ATF did not measure but assumed to be accurate based on alleged advertising of

unknown entities that is not in the record, was within the compass of 26 U.S.C. § 5845(b).

The government continues by claiming, for the first time on appeal, that “It would be anomalous to suggest that Congress disabled ATF from moving to prevent the distribution in interstate commerce of a weapon that is in every respect the practical equivalent of a machinegun.” Government Brief at 15. At the outset, it is appropriate to remind the Court that the Akins Accelerator is not a “weapon” at all. It is a replacement stock for a rifle. Standing alone, its only application would be as a club, and not a very effective one at that.

The ATF never has taken the position (even in the administrative record or in the District Court) that it interprets the statute to empower it to declare all “simulated” machine guns to be machine guns. It cites no other instances where it has taken that position. Indeed, just the opposite is true. In *United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003), an ATF agent testified that a “ ‘trigger activator’ gives the illusion of functioning as a machine gun.” They work by “using springs that force the trigger back to the forward position, *meaning that you have to separately pull the trigger each time you want to fire the gun....*” [Emphasis in original]. Again, the use of the word “pull” in this context means nothing, as the only “function” of the trigger in that case was the “pull.” The point of the quotation is to show that

devices that “give the illusion of functioning as a machine gun” do not constitute machine guns, and the ATF acknowledges as much.

It is helpful to look to the actual transcript of the testimony cited by the 5th Circuit². In the Transcript, the ATF agent testified that “because of those powerful springs within that TAC trigger [the trigger activator being discussed], *it makes you pull that trigger so fast that it gives the illusion of a machine gun.*” Transcript, p. 20. A device with recoil springs that pushes the trigger back into the shooter’s finger is legal, unless it goes by the name Akins Accelerator. Excerpts of a certified copy of the transcript are appended to this Reply Brief.

ATF Acted With Bias against the Akins Accelerator

For the first time on appeal, the government attempts to defend itself against Akins’ claim that the ATF acted with bias, by saying, “There is not a shred of evidence to suggest that agency personnel were motivated by anything but a bona fide desire to better effectuate the congressional prohibition on machine guns.” Government Brief at 17. Akins has never questioned ATF personnel’s motives. His claim of bias is based solely on the documents that ATF placed into the record. Those documents

² The testimony is publicly available from the clerk in *United States v. Camp*, No. 5:02-cr-50013-DEW-RSP, U.S. District Court for the Western District of Louisiana, Document No. 27, Transcript of Trial held August 19, 2002.

demonstrate that the ATF determined that the Akins Accelerator was a machine gun *before they tested it and even before they obtained a sample to test.*

The government attempts to downplay the documents by recharacterizing them. “By August 2006, ATF had recognized that the Akins Accelerator was a highly dangerous device that transforms a rifle into the practical equivalent of a machinegun.” *Id.*, citing R1-19(3)-24. An inspection of that page of the record, however, reveals no such thing. Instead, it shows that the chief of the ATF Firearms Technology Branch declared on August 16, 2006 that “two companies are manufacturing machineguns.” He does not say anything about anything being “highly dangerous” or “practical equivalent of a machinegun.” He says they are machineguns, period. He continues by saying, “We feel that ATF needs to put a stop to the sales ASAP. In order to make a legal case, FTB needs to evaluate these machine guns.” He requests samples (to be procured in an undercover operation) for testing *even though he already has determined what the outcome would be.* If this is not pre-judging a matter that the chief of this branch would have jurisdiction over, then what is? The fact that the samples were to be obtained undercover also indicates that ATF did not wish to afford Akins an opportunity to participate in the matter. Undercover

operations are for criminal investigations, not routine administrative proceedings.

The government confuses this issue by asserting, “Plaintiff finds it suspicious that ATF did not re-test his device until after it opened its investigation.” Government Brief at 17, FN 2. This is incorrect. If the government merely opened an investigation and then tested the device, that would be normal. In this case, however, the ATF did not re-test the Akins Accelerator until *after* it completed its “investigation” and determined the Akins Accelerator to be a machine gun. Akins already stated the chronology in his opening Brief, but will repeat it here in a different format to try to clear up the government’s confusion:

<u>Date</u>	<u>Event</u>	<u>Record Citation</u>
1/17/2003	ATF determines Akins Accelerator is not a machine gun.	R1-19(3)-14
1/29/2004	ATF clarifies that ATF understands The theory of operation of the Akins Accelerator and made determination that Akins Accelerator is not a machine gun in spite of fact that sample provided did not function as intended.	R1-19(3)-22
8/16/06	FTB Chief declares (without additional testing or inspection) Akins Accelerator to be a machine gun; vows to stop them, and seeks way to make “legal case.”	R1-19(3)-24
9/8/06	Unnamed ATF employee says in email,	R1-19(4)-3

“We evaluated the device and conferred with counsel (9/8/06) and determined it to be a machine gun.”

9/22/06	ATF agents order Akins Accelerator for testing, using a P.O. box for apparent anonymity.	R1-19(3)-54, 55
10/11/06	ATF agents that ordered Akins Accelerator sent it to FTB to testing.	R1-19(3)-54

No matter how the government spins the facts, it cannot deny (nor does it attempt to do so in its Brief) that 1) the ATF FTB chief declared the Akins Accelerator to be a machine gun before his branch did any inspection or testing or even obtained a sample; and 2) an unnamed ATF employee met with ATF counsel and determined the Akins Accelerator to be a machine gun before any inspection or testing or obtaining a sample.

Again, Akins does not question the motives of these employees, as he has no information upon which to judge their motives. The facts remain, however, that the very branch of the ATF responsible for evaluating firearms determined before it ever saw or touched the Akins Accelerator that it was a machine gun. This is not the “neutral and detached judge” that due process requires. *Concrete Pipe & Products v. Construction Laborers and Pension Trust*, 508 U.S. 602, 617 (1993).

There is a Genuine Dispute of Material Fact

While the government urges that there is no dispute of fact, the government's brief is replete with misstatements of fact that call into question what facts actually were used by ATF in rendering its decisions. Because the administrative record contains *no findings of fact*, it is impossible for a reviewing court to know if the ATF even understood the facts when it made its decision to re-classify the Akins Accelerator

On p. 3 of its Brief, the government quotes Akins' patent abstract (R1-12-3) for the fact that "a shooter can pull a rifle's trigger a single time and fire a continuous stream of bullets." The one-paragraph abstract tells a different story. The final two sentences say:

The trigger is translated away from the immobilized trigger finger to effect a total disengagement therebetween. Sequentially thereafter *the trigger is biased into engagement with the immobilized trigger finger* to effect successive discharges of the firearm."

R1-12-3 [Emphasis supplied]. Aside from the fact that the patent abstract does not use the colorful phrase, "fire a continuous stream of bullets," it is clear from the abstract that the shooter's finger must engage the trigger over and over again to fire the rifle.

The government uses other colorful verbs to describe the action of the host rifle and Akins Accelerator, but such verbs inaccurately describe the

action and may give rise to confusion³. The rifle no more “leaps” forward [government Brief at 3] than it “rocks.” [*Id.*]. As described both in the patent abstract [R1-12-3] and Akins’ declaration [R1-25(3)-4]⁴, the rifle moves rearward from the force of its normal recoil after firing, and it then moves forward again from a spring in the Akins Accelerator countering the recoil. And, the motion is held completely linear by two steel rods [R1-25(3)-4], as opposed to some “rocking” motion imagined by the government.

The government alternatively describes the Akins Acceleratory as enabling the host rifle to fire at a rate of 650 rounds per minute and 800 rounds per minute. The first figure is based solely on an unattributed hearsay statement repeated in letter by an ATF official. R1-19(4)-5 (a letter from ATF Assistant Chief of the Firearms Technology Branch Richard Vasquez to Akins’ business partner, stating that the device was “advertised to fire approximately 600 rounds per minute.”) There is no indication in the

³ By inciting fear of the Akins Accelerator and confusing the Court as to the operation of the device, it is possible the government hopes to induce the Court to throw up its hands in frustration and defer to the agency’s determination. It would not be necessary to deploy such tactics if there were a cogent, meaningful record that included a neutral report of tests actually performed on the Akins Accelerator.

⁴ The nomenclature used here, R1-25(3)-4, uses the Circuit rules for citations to the record but takes into account that District Court document numbers can refer to multiple documents. In this instance, the citation is the Record Volume 1, Document 25-3, page 4.

letter who made those advertising claims nor, more importantly, on what they were based. Again, however, this would not be an issue if the ATF actually had performed tests (perhaps even scientifically repeatable tests) on the Akins Accelerator and included those test results in its record. Instead, the agency apparently based its decision to shut down Akins' livelihood on uncorroborated and unattributed hearsay.

The second figure (800 rounds per minute) is not advertisement, as claimed by the government on p. 4 of its Brief. The source in the administrative record appears to be the first page of a magazine article about the Akins Accelerator, in which a "teaser" question is asked about a rifle that fires at that rate⁵. Again, it appears the government based its decision to reverse its 4-year-old determination upon which Akins relied upon a teaser in a magazine. Surely the premier firearms regulation agency in the world has the means to test firearms independently without relying on the press for its information.

The two foregoing paragraphs are not to say that Akins denies that the Akins Accelerator does not allow a .22 rifle to fire quickly. The point is that no claims about rates of fire attributed to Akins are contained in the record.

⁵ Somewhat like a television news teaser saying, "Is an asteroid going to collide with the Earth this week? You'll find out this and all the news tonight at 11." Such a teaser is hardly a valid basis for claiming in a legal document that an asteroid is going to collide with the Earth.

Even if there were, that does not excuse the ATF's failure to make its own tests and determine the facts for itself. Moreover, the government's brief implies that it is possible for a rifle with the Akins Accelerator to fire 650 (or 800) rounds in one minute. It is not. The Ruger 10/22 comes from the factory with a 10-round magazine. Commercially available magazines typically hold no more than 30 rounds. Finally, as discussed in Akins' opening Brief, the rate of fire of a firearm is completely irrelevant in determining whether the firearm is a machine gun. Even if it were, ATF official Vasquez claimed that he could move his finger with the trigger on the assembled combination, indicating that he can fire a Ruger 10/22 just as fast without the Akins Accelerator as with it. R1-19(5)-1. The ATF does not claim that the Ruger 10/22 is a machine gun.

The government attempts to downplay the dispute of fact by claiming, "There is no disagreement, however, about the manner in which the device operates: it harnesses the recoil of a semi-automatic weapon to allow it to rock hundreds of times per minute against a stationary trigger finger." Government Brief at p. 20. This is incorrect, as Akins never has asserted nor agreed that there is any rocking motion, as discussed above. In fact, Akins specifically designed the Akins Accelerator not to rock, but to maintain linear motion to improve firing accuracy. What is in agreement is the

government's next statement, "Each time the trigger presses against the shooter's finger, another bullet is fired." *Id.* Exactly. The trigger must function every time to fire another shot. Yet, no where does the ATF express this operational characteristic when explaining why it re-classified the Akins Accelerator to be a machine gun.

The Agency Record Was Incomplete

The government denies that it "first asserted the existence and service of a privilege log ... in its Reply Brief" in the district court." *Id.*, FN 4. The government attempts to refute this by pointing to a footnote in its record table of contents that says, "[a] copy of the privilege log will be supplied to Plaintiff." A statement of what ***will be provided in the future*** neither asserts that the document then existed or was served. Quite the opposite, it implies that the document has not been served. It still has not been served, and the record is devoid, even now, of any certificate of service that a privilege log has been provided.

The government complains that the lack of a privilege log was not raised in the District Court. *Id.* This is not true. In his Brief opposing the government's Motion for Summary Judgment [R1-25-4], Akins clearly states, "Moreover, many documents in the record have unexplained redactions on them, and 49 pages were omitted altogether (again without

explanation).” Because Akins did not receive a privilege log, he was in no place to complain about what was or was not included in it. And, this is an issue raised by the District Court in its order, where it found, without support in the record, that Akins had been provided a privilege log when in fact he had not.

The Government Confuses Pre-Deprivation Hearings with Post-Deprivation Hearings

The government excuses ATF’s failure to give Akins a *pre-deprivation* hearing under *Matthews v. Eldridge*, 424 U.S. 319 (1976) by saying Akins was “provided with notice of the classification decision and an opportunity to challenge that decision.” That is, the government says the Due Process clause never requires a *pre-deprivation* hearing (even though *Eldridge* holds otherwise) when there is an opportunity for a *post-deprivation* challenge. While the government glosses over it, its version of a post-deprivation challenge “opportunity” is that anyone can write a letter to the ATF and complain about what the ATF did. The government would have this Court rule that *having a mailing address is all that the Due Process clause requires*. This is absurd. If that is the law, then a hearing is never required by the Due Process clause, as every government agency has a mail box.

The government relies in part on *Darrell Andrews Trucking, Inc. v. FMCSA*, 296 F.3d 1120 (D.C. Cir. 2002) for the proposition that notice and an opportunity to present evidence is all that due process requires. Government Brief at 23. The government claims that notice after the fact of ATF's re-classification and the ability to mail a protest were Akins "notice" and "opportunity to present evidence." In *Darrell Andrews*, however, the notice was a citation sent before any decision was made. The opportunity to present evidence was such an opportunity before any decision was made. Here, ATF intentionally kept the proceeding a secret by conducting an undercover operation. Because the ATF kept the matter a secret, Akins had no notice and no opportunity to present evidence until after the decision was made.

The Statute is Unconstitutionally Vague

Finally, the government defends the constitutionality of 26 U.S.C. § 5845(b) based on the fact that "no court has ever held it unconstitutional." While true, that fact is irrelevant. In an as-applied challenge, it matters not one whit whether the statute has been upheld once or 1,000 times. What matters is whether this particular application is constitutional. Hence, the name "as-applied" challenge.

In addition, the government cannot cite to a single other instance where it determined a device not to be a machine gun, then later re-classified it to be a machine gun when nothing had changed. The government's inability to determine whether the device is or is not a machine gun leads one to believe that the statute does not put a person on notice what is prohibited.

Moreover, *the government concedes that for the Akins Accelerator, "Each time the trigger presses against the shooter's finger, another bullet is fired."* Government Brief at 20. Yet, somehow the government believes that a person of ordinary intelligence would know that such a device is included in the definition, "shoot(s), automatically more than one shot, without manual reloading, by a single function of the trigger." The government is wrong. It is illogical for the ordinary person to equate another bullet being fired "each time the trigger presses against the shooter's finger" with more than one shot for "a single function of the trigger." They are exact opposites.

Even more telling is the fact that the ATF misunderstands the purpose and effect of the statute. The government somehow interprets *United States v. Haney*, 264 F.3d 1161, 1168 (10th Cir. 2001) as standing for the proposition that it was "Congress' manifest intent to get automatic weapons

off the market.” Government Brief at 14. The section the government quoted from *Haney* says nothing more than that there is a “federal scheme to regulate interstate commerce in dangerous weapons.” Regulating commerce is not the same as a “manifest intent” to eradicate commerce. The ATF fails to mention to this Court that all machine guns manufactured before 1986 continue to exist in the market and can readily be bought and sought by citizens. If every device declared by the ATF to be a machine gun is found to be a machine gun because ATF believes there is a manifest intent to get machine guns off the market, then this circular logic surely renders the statute unconstitutional. What person of ordinary intelligence is going to be able to predict with any degree of certainty what the ATF’s whim of the day is?

Finally, the ATF’s ruling in this matter, 2006-2, extends the congressional definition of machine gun to virtually all semiautomatic firearms. In the ruling, the ATF determined that a device is a machine gun when, “once activated by a single pull of the trigger, initiates an automatic firing cycle which continues until either the finger is released or the ammunition supply is exhausted.” Despite the fact that the description of the Akins Accelerator’s operation includes the finger being released from the trigger in between each and every shot, the ATF determined that this

definition includes Akins Accelerator. The problem with this ruling is that virtually every semiautomatic firearm can be made to “bump fire,” and therefore any semiautomatic firearm could be deemed to be a machine gun under this definition. It is not at all clear that Congress intended this result.

The Court of Federal Claims Case Still is Appealable

The government also claims that Akins did not appeal the dismissal of his Court of Federal Claims case. Government’s Brief, p. 7. While this is true, what the government fails to tell the Court is that the Court of Federal Claims judgment was not entered until December 22, 2008⁶, ***one day before the government filed its Brief.*** Akins has 60 days from that date to file a notice of appeal of that case. The fact that Akins had not yet filed a notice of appeal within one day after he was first entitled to do so does not in any way imply that the Court of Federal Claims opinion has become a final, nonappeable judgment.

⁶ The Order of the Court of Federal Claims was not entered as a separate document judgment, as required by Ct. Fed. Cl. R. 58(a). The judgment of the court is therefore deemed entered by operation of law 150 days after the Order was docketed. The 150th day was December 21, 2008, a Sunday. Assuming that a judgment is not entered on a weekend, the judgment was therefore entered on December 22, 2008.

Conclusion

Because the government has failed to overcome the District Court errors described in Akins' opening Brief, the judgment of the District Court must be reversed.

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Certificate of Compliance

I certify that this Reply Brief of Appellant complies with Rule 32(a)(7)(B) length limitations, and that this Reply Brief of Appellant contains 5,809 words as determined by the word processing system used to create this Reply Brief of Appellant.

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Appendix

Excerpts of Certified Copy of Transcript in *USA v. Camp*

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL ACTION
	*	NO. 02-50013-01
VERSUS	*	
	*	August 19, 2002
ERNEST CAROL CAMP	*	9:00 a.m.
	*	Shreveport, Louisiana
* * *	*	

Certified Copy

Certified transcript of trial proceedings held before the
Honorable Donald E. Walter, United States District Judge.

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PROCEEDINGS PRODUCED BY MECHANICAL STENOGRAPHY AND TRANSCRIBED
BY COMPUTER.

1 A. Yes, sir.

2 Q. And that only took one human pull of the trigger; is that
3 correct?

4 A. Yes, sir.

5 Q. All right. And so the only way that gun would stop
6 firing would be if the ammunition is gone or depleted and
7 you've released the trigger?

8 A. That's correct.

9 Q. You don't have to reload each time you shoot, do you?

10 A. No, sir.

11 Q. All right. Does it fit the technical -- well, not
12 technical, but does it fit the legal definition of a "machine
13 gun"?

14 MR. KEENE: Objection.

15 A. Yes, sir, it does.

16 MR. COWLES: He can opine on --

17 THE COURT: Yeah, he did. I overruled it.

18 BY MR. COWLES:

19 Q. Now, are you familiar with what's called "trigger
20 activators"?

21 A. Yes, sir, I am.

22 Q. And did I show you some documentation that -- copies of
23 documents apparently printed off the internet that, as I told
24 you, Mr. Keene had submitted to me as part of their argument of
25 what this thing actually was, that --

1 A. Yes, sir.

2 Q. -- I showed this to you?

3 Okay. Would you explain to the Court what a trigger
4 activator is, first. Can you go ahead -- are you familiar with
5 trigger activators?

6 A. Yes, sir.

7 Q. What are they?

8 A. Trigger activators are a commercially-produced firearm
9 accessory known by various trade names as "TAC Trigger,"
10 "Autoburst," "Autoburst II," depending on who the manufacturer
11 is. They are in fact a legal device, and what they do is they
12 attach to the trigger of a firearm, and there are various
13 springs involved with this device, and as you pull the trigger
14 and fire the weapon, these devices use a small powerful spring
15 that force the trigger back to the forward position, meaning
16 that you have to separately pull the trigger each time you want
17 to fire the gun, but it gives the illusion of functioning as a
18 machine gun.

19 Q. All right. Now, and have you evaluated trigger activator
20 devices as part of your duties as an expert with ATF?

21 A. Yes, sir, I have.

22 Q. Now, is there a difference between a trigger activator
23 legal device and this contraption that the defendant put
24 together?

25 A. Yes, sir, there is.

1 Q. All right. What is the difference?

2 A. If I can point to the weapon to show. The trigger
3 activator --

4 Q. All right. Move that piece of paper, because we can't
5 see any of that.

6 A. The trigger activators that are commercially produced fit
7 over the trigger of a firearm similar to the way this fishing
8 reel hand crank is positioned over the trigger of this
9 particular firearm. The difference is with these TAC triggers
10 or trigger activators, you have to actually manually pull the
11 trigger each time you want to fire the weapon; and as I stated
12 earlier, because of those powerful springs within that TAC
13 trigger, it makes you pull that trigger so fast that it gives
14 the illusion of a machine gun.

15 Q. And those are legal in some states?

16 A. Yes, sir, they are, because you have to pull the trigger
17 each time you want to fire the weapon.

18 Q. So that does not fit the definition of the National
19 Firearms Act, does it?

20 A. No, sir, it doesn't.

21 Q. All right. Okay. Now go ahead and explain it to me.

22 A. Now, the difference with this firearm is although we have
23 a fishing reel that's -- we all know how you hand crank a
24 fishing reel when you want to reel in a fish; well, this is
25 rigged so that that fishing reel crank would in fact pull the

C E R T I F I C A T E

I, Marie Moran Runyon, Official Court Reporter, do hereby certify that the foregoing pages numbered 1 through 35 do constitute a true and correct record of proceedings had in said trial to the best of my ability and understanding.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Subscribed and sworn to this 10th day of March, 2008.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM AKINS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, to the best of his knowledge, the lists of interested persons provided in appellant's opening brief and the brief of amicus curiae is complete.

 /s/
NICHOLAS BAGLEY

STATEMENT REGARDING ORAL ARGUMENT

The government does not request oral argument because this case involves the application of settled law to undisputed facts. We of course stand ready to present argument if the Court believes it would be useful.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM AKINS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 & 1346(a)(2). D1, at 2. Final judgment was entered on September 23, 2008, and defendants filed a timely notice of appeal on September 30, see Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosives acted arbitrarily, capriciously, or contrary to law in classifying plaintiff's device as a machinegun.

2. Whether the agency's classification decision violated plaintiff's rights under the Due Process Clause.

STATEMENT OF THE CASE

The Akins Accelerator is a device that, when mounted on a semi-automatic rifle, allows a shooter to pull the trigger a single time and fire at a rate of roughly 650 rounds a minute. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) determined in November 2006 that the device qualified as a "machinegun" and that its possession was therefore prohibited under the Gun Control Act. In May 2008, William Akins, the inventor and manufacturer of the Akins Accelerator, filed suit to challenge ATF's classification of his device. Four months later, the district court granted the government's motion for summary judgment. Plaintiff appealed.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND.

The Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), amended the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, to prohibit any person from possessing a "machinegun" manufactured after May 19, 1986. 18 U.S.C. § 922(o). "Machinegun" is in turn defined in the National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934), as amended, to mean

any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under

the control of a person.

26 U.S.C. § 5845(b). The Bureau of Alcohol, Tobacco, Firearms and Explosives is charged with administering the Gun Control Act and the National Firearms Act. See 18 U.S.C. § 926; 27 C.F.R. Part 479; Gun South, Inc. v. Brady, 877 F.2d 858, 864 (11th Cir. 1989) (recognizing delegation); York v. Secretary of Treasury, 774 F.2d 417, 419 (10th Cir. 1985) (same).

II. FACTUAL BACKGROUND.

A. The Device.

In 1998, plaintiff William Akins invented the Akins Accelerator. The device is an assembly for the stock of a semi-automatic rifle. Without the device, a semi-automatic rifle will shoot a single bullet with a single pull of the trigger. With the device, however, a shooter can pull a rifle's trigger a single time and fire a continuous stream of bullets. D12, at 3 (stating in his patent application that the device would "increase the cyclic rate at which the trigger of a semi-automatic firearm can be actuated to discharge the weapon").¹ The device works by using a spring to reverse the recoil of the semi-automatic weapon. Whereas the recoil of a rifle normally causes the rifle to fall back after firing, the spring inside the device allows the rifle to leap back into place automatically. See Appellant's Br. 4-5.

The effect is that the rifle rocks at a rate of hundreds of

¹ "D" provides a reference to the district court docket entry. "AR" refers to the administrative record filed with the district court.

times a minute against a stationary trigger finger that is, in turn, held in place by stop screws. Each time the gun rocks forward, the trigger is actuated and a new bullet is fired. See Appellant's Br. 5; see also D12, at 3 (plaintiff's patent describing device); D19-3, at 5 (AR 3) (plaintiff's lawyer's description of the device); D19-4, at 9 (AR 94) (ATF's description of device). As a result, the Akins Accelerator allows for the continuous firing of approximately 650 rounds per minute--more than ten bullets per second. D19-4, at 9 (AR 94); see also D19-5, at 10 (AR 232) (advertising that the device "fires at 800 rounds per minute, accurately and controllably"). The district court record includes a video from plaintiff's website offering a vivid demonstration of the device in action. See D21 (government's motion "to file evidence in its original form") (also available at www.youtube.com/watch?v=9P8AbTKvykE).

B. The Initial Classification.

Plaintiff contacted the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in March 2002 to ask whether his device would be classified as a machinegun. D19-3, at 3 (AR 1). An attached letter from his attorney explained that plaintiff had "devised a simple and inexpensive, but ingenious, method of altering the stock on some semiautomatic rifles in a manner which allows them to be fired so rapidly that the practical effect is equivalent to a fully-automatic machinegun." D19-3, at 5 (AR 3). Plaintiff sent a second request for a classification decision in June 2003. D19-3, at 7 (AR 5).

In July 2003, ATF asked plaintiff to provide a sample of the device for testing, D19-3, at 9 (AR 7), which he did, D19-3, at 10 (AR 8). In November 2003, the Firearms Technology Branch (FTB) of ATF sent a letter to plaintiff stating without elaboration that "[t]he weapon did not fire more than one shot by a single function of the trigger" and concluding that "the submitted stock assembly does not constitute a machinegun * * * ." D19-3, at 15 (AR 13). The letter noted, however, that the device had broken during testing. Uncertain whether the classification related only to the defective device or whether it covered a properly functioning Akins Accelerator, plaintiff asked for clarification in January 2004. D19-3, at 21 (AR 19). FTB explained in response that its classification determination was based on the stock assembly's "theory of operation," which "was clear even though the rifle/stock assembly did not perform as intended." D19-3, at 22 (AR 20).

C. ATF's Reclassification of the Device.

In August 2006, ATF grew concerned that it had approved a device that was, as a functional matter, indistinguishable from a machinegun. D19-3, at 24 (AR 22). For that reason, the agency opened an investigation into the device. D19-3, at 34 (AR 32).

After completing its investigation, ATF informed plaintiff in November 2006 that it had revisited its classification determination and concluded that the Akins Accelerator was a machinegun because it "shoot[s] automatically more than one shot, without manual reloading, by a single function of the trigger."

D19-4, at 9 (AR 94) (emphasis in original) (quoting 26 U.S.C. § 5845(b)). The agency explained that the legislative history of the National Firearms Act "indicates that the drafters equated 'single function of the trigger' with 'single pull of the trigger.'" D19-4, at 9 (citing National Firearms Act: Hearings Before the Committee on Ways and Means, House of Representatives, Second Session on H.R. 9066, 73d Cong., at 40 (1934)). For that reason, "it is the position of this agency that conversion parts that are designed and intended to convert a weapon into a machinegun, that is, one that will shoot more than one shot, without manual reloading, by a single pull of the trigger, are regulated as machineguns under the National Firearms Act and the Gun Control Act." D19-4, at 9-10 (AR 94-95). ATF further noted that, "[t]o the extent the determination in this letter is inconsistent with" its earlier classification decisions, "they are hereby overruled." D19-4, at 10 (AR 95).

In January 2007, ATF issued Ruling 2006-2, which formally adopted the position that the definition of "machinegun" includes devices that, "once activated by a single pull of the trigger, initiate an automatic firing cycle which continues until either the finger is released or the ammunition supply is exhausted." D19-4, at 17 (AR 114). As in its letter to plaintiff, ATF explained that this position accorded both with the statutory language defining "machinegun" and its legislative history. D19-4, at 18 (AR 115). The interpretive ruling emphasized that "[t]o

the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled." D19-4, 19 (AR 116).

In February 2007, plaintiff asked ATF to reconsider its position and requested an oral hearing. D19-4, at 26 (AR 123). ATF "considered [plaintiff's] arguments for reconsideration" but nevertheless "determined that the device should remain classified as a machinegun for the reasons stated in the ruling." D19-5, at 31 (AR 190).

III. PROCEDURAL HISTORY.

In March 2007, plaintiff filed suit against the United States in the Court of Federal Claims seeking, among other things, compensation under the Takings Clause for damages arising out of ATF's reclassification of his device. The court dismissed plaintiff's suit in July 2008, Akins v. United States, 82 Fed. Cl. 619, 622-23 (Ct. Fed. Cl. 2008), holding that he "fail[ed] to state a compensable takings claim under the Fifth Amendment" because ATF had been acting pursuant to its police powers. In addition, the district court observed that plaintiff had "voluntarily entered an area subject to pervasive federal regulation--the manufacture and sale of firearms," which undercut any "expectation interest in manufacturing and distributing Akins Accelerators to the public free from Federal regulation." Id. at 624. Plaintiff did not appeal.

On May 19, 2008, plaintiff filed a complaint against the United States in the District Court for the Middle District of Florida. In this new complaint, plaintiff (1) challenged the

classification of his device as a machinegun; (2) argued that his right to due process was violated when ATF declined to provide him with an oral hearing on the classification of his device; and (3) maintained that the statutory definition of "machinegun" was unconstitutionally vague. D1.

The district court granted the government's motion for summary judgment in September 2008. D29. The court began by carefully describing the history of the classification determination and noting that "[p]laintiff does not dispute that the purpose of the Akins Accelerator is to make it possible for the shooter to act once and cause the rifle to fire repeatedly until its ammunition is exhausted or until the shooter takes an action to remove hi[s] finger from the device." D29, at 10. The court then held that ATF's determination that this sort of device operated through a "single function of the trigger," and was hence a machinegun, was consistent with law and neither arbitrary nor capricious. The court noted that the legislative history confirmed the agency's view that a "single function of the trigger" encompassed a single pull of the trigger. D29, at 11. And the court observed that, in Staples v. United States, 511 U.S. 600 (1994), the Supreme Court "adopted the view that 'single function of the trigger' is synonymous with 'single pull of the trigger.'" D29, at 11.

The court rejected plaintiff's contention that ATF's reconsideration of its original classification determination rendered its later designation arbitrary and capricious: "In this

case," the court explained, "ATF presents * * * a 'reasoned analysis,' demonstrating that its new interpretation of the phrase 'single function of the trigger' is necessary to protect the public from dangerous firearms." D29, at 12 (quoting Gun South Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989)).

The court also rejected plaintiff's argument that due process required ATF to offer an oral hearing on its classification determination. The court first noted that plaintiff had made an "actual presentation of his arguments in written form to the agency," and that "the APA does not require that ATF provide him with a formal hearing." D29, at 14-15. Applying the three-factor balancing test from Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the court then found that the Due Process Clause likewise imposed no oral hearing requirement. The court reasoned (1) that "the pervasive federal regulation of the manufacture and sale of firearms" seriously qualified plaintiff's interest in selling guns free from federal regulation, D29, at 15; (2) that the risk of erroneous deprivation of that interest was small given that plaintiff had been allowed to submit voluminous arguments to ATF, D29, at 15-16; and (3) that ATF had a profound public interest in moving quickly to prohibit the unhindered sale of a weapon that was, in practical effect, indistinguishable from a conventional machinegun, D29, at 18. The court further noted that "Plaintiff fails to even argue how an oral hearing would have made a difference in the outcome" given that he "presented only

questions of law and statutory interpretation, not factual disputes of the sort that require an oral hearing.” D29, at 16.

Finally, the district court rejected plaintiff’s argument that the statutory definition of machinegun was unconstitutionally vague. Recognizing that a statute is void for vagueness “‘only where no standard of conduct is outlined at all; when no core of prohibited activity is defined,’” D29, at 19 (quoting Ford Motor Co. v. Texas Dep’t of Transp., 264 F.3d 493, 509 (5th Cir. 2001)), the court found that “Plaintiff’s own actions in communicating repeatedly with ATF suggest that the statute gave him fair notice that Akins Accelerators might well fall within the prohibited standard of conduct.” D29, at 19.

One week later, plaintiff filed a notice of appeal. D31.

SUMMARY OF ARGUMENT

Federal law bans the possession of post-1986 machineguns, which are defined to include “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.” 26 U.S.C. § 5845(b).

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) reasonably determined that this definition covers the Akins Accelerator, which augments the firing rate of a standard-issue rifle to allow a shooter to fire approximately 650 rounds per minute with a single pull of the trigger. Plaintiff offers no basis for setting aside the agency’s determination. ATF acted consistently with the language, legislative history, and purpose

of the statute in determining that a weapon that fires automatically upon a single pull of the trigger is a weapon designed to shoot more than one shot by a single function of the trigger.

Plaintiff's constitutional arguments are insubstantial. Plaintiff was provided with notice of ATF's classification decision and given an opportunity to raise written objections. Due process did not require the agency to also provide an oral hearing. Nor does plaintiff offer any explanation of how such a hearing might have altered the agency's decision.

Plaintiff's contention that the definition of "machinegun" is unconstitutionally vague is likewise without merit. The statutory language put plaintiff on notice that a device that increased the firing rate of a semi-automatic rifle to roughly 650 rounds a minute might constitute a machinegun. For that reason, plaintiff repeatedly sought out ATF's views as to the proper classification of his device. As the two circuit courts to have considered vagueness challenges to the definition of "machinegun" have held, it cannot plausibly be maintained that "the person of ordinary intelligence" would lack "a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

STANDARD OF REVIEW

The district court's entry of summary judgment is reviewed de novo. See Great Lakes Dredge & Dock Co. v. Tanker, 957 F.2d 1575, 1578 (11th Cir. 1992). "[E]ven in the context of summary

judgment," however, "an agency action is entitled to great deference. Under the Administrative Procedure Act, a court shall set aside an action of an administrative agency where it is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2) (A)." Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996).

ARGUMENT

I. THE AGENCY ACTED REASONABLY IN CLASSIFYING PLAINTIFF'S DEVICE AS A MACHINEGUN.

A. The Agency's Interpretation of the Definition of "Machinegun" Is Reasonable and Entitled to Deference.

"We must defer to the [ATF's] interpretation of the Gun Control Act and its regulations absent plain error in the Bureau's interpretation.'" Farmer v. Higgins, 907 F.2d 1041, 1045 (11th Cir. 1990) (quoting Gun South, Inc. v. Brady, 877 F.2d 858, 864 (11th Cir.1989)). See also Vineland Fireworks Co., Inc. v. ATF, 544 F.3d 509, 514 (3d Cir. 2008) (holding that, in reviewing challenges to the "interpretation of the statutory provisions ATF administers, we utilize principles of Chevron deference").

Under these principles, this Court "defer[s] to the agency's interpretation if it 'is based on a permissible construction of the statute.'" Miami-Dade County v. EPA, 529 F.3d 1049, 1062 (11th Cir. 2008) (quoting Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). As the Supreme Court has explained, "when an agency is charged with

administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." IRS v. FLRA, 494 U.S. 922, 933 (1990).

ATF acted well within the scope of its discretion in concluding that the Akins Accelerator falls within the statutory definition of machinegun. As defined in 26 U.S.C. § 5845(b), the term "machinegun" means "any weapon which shoots * * * automatically more than one shot, without manual reloading, by a single function of the trigger." ATF reasonably concluded that the device, which is designed to permit a shooter to pull the trigger of a semi-automatic rifle a single time and expel a continuous stream of bullets at a rate of approximately 650 rounds per minute, comes within the compass of this provision.

In reaching this conclusion, ATF interpreted the phrase "single function of the trigger" to include devices that, "once activated by a single pull of the trigger, initiate an automatic firing cycle which continues until either the finger is released or the ammunition supply is exhausted." D19-4, at 17 (AR 114). This definition is fully consonant with the statute. As the Supreme Court explained in Staples v. United States, 511 U.S. 600, 602 n.1 (1994) (internal quote omitted), a weapon is a "machinegun[] within the meaning of the [National Firearms] Act" if it "fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." See also George C. Nonte, Jr., Firearms

Encyclopedia 13 (1973) (defining the term "automatic" to include "any firearm in which a single pull and continuous pressure upon the trigger (or other firing device) will produce rapid discharge of successive shots so long as ammunition remains in the magazine or feed device--in other words, a machinegun").

In addition, as ATF explained, its interpretation of "single function of the trigger" comports with a definition offered in a congressional hearing leading up to the enactment of the National Firearms Act, which first enacted the phrase into law. As the then-president of the National Rifle Association explained to Congress, a gun "which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun." National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2nd Sess., at 40 (1934). Although both plaintiff and amici criticize ATF's reliance on a statement from a congressional hearing, Appellant's Br. 23, Amicus Br. 14-16, ATF invoked it not as a definitive indication of congressional intent. The testimony instead bolsters the agency's unremarkable point that interpreting "a single function of the trigger" to include "a single pull of the trigger" is a reasonable gloss on the statutory term.

Furthermore, ATF's interpretation of "single function of the trigger" accords with Congress's manifest intent to get automatic weapons off the market and keep them out of the hands of dangerous criminals. See United States v. Haney, 264 F.3d 1161,

1168 (10th Cir. 2001) (observing that "banning possession of post 1986 machine guns is an essential part of the federal scheme to regulate interstate commerce in dangerous weapons"). Plaintiff acknowledges that he has "devised a simple and inexpensive, but ingenious, method of altering the stock on some semiautomatic rifles in a manner which allows them to be fired so rapidly that the practical effect is equivalent to a fully automatic machinegun." D19-3, at 5 (AR 3). It would be anomalous to suggest that Congress disabled ATF from moving to prevent the distribution in interstate commerce of a weapon that is in every respect the practical equivalent to a machinegun.

In short, ATF's interpretation of the statutory definition of "machinegun" is eminently reasonable, and is therefore entitled to deference under Chevron.

B. Plaintiff Fails to Demonstrate Any Infirmities in the Agency's Classification Decision.

Plaintiff objects to ATF's interpretation on several grounds. First, plaintiff maintains that ATF improperly took into account policy considerations and disregarded the statutory text in interpreting the phrase "single function of the trigger." Appellant's Br. 16-17 (criticizing agency's reliance on "policy" and "views"); Appellant's Br. 19-21 (criticizing agency's concern with public safety). Because ATF must interpret the phrase "single function of the trigger" in order to carry out its delegated responsibilities, however, it was incumbent upon the agency to "consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 863-64.

That the agency's considered policy judgment clashes with plaintiff's does not render its interpretation unreasonable.

Plaintiff offers no support for the counter-intuitive position that the statutory phrase "single function of the trigger" necessarily excludes devices that operate by a "single pull of the trigger." "[F]unction" is a word of broad scope that, on one definition, means "any of a group of related actions contributing to a larger action." Webster's Ninth New Collegiate Dictionary 498 (1986). ATF reasonably concluded that a single pull of the trigger on a semi-automatic firearm equipped with the Akins Accelerator is an "action" that "contribut[es] to a larger action," which is to say, the continuous firing of a weapon at a rate of roughly 650 rounds per minute.

Plaintiff nevertheless asserts that ATF's interpretation is "absurd" because defining "single function of the trigger" to mean "single pull of the trigger" would exclude from the definition of machinegun devices that operate by pressing a switch to activate an automatic firing cycle on a semi-automatic weapon. Appellant's Br. 22; see also Amicus Br. 17-19 (making similar argument). Plaintiff misunderstands the agency's interpretation. ATF has never suggested that devices that operate by means other than pulling are excluded from the definition of machinegun. To the contrary, the agency has explicitly noted that "'function' * * * does not limit ATF to a narrow definition such as 'pull only.'" D19-4, at 61 (AR 159); see also United States v. Camp, 343 F.3d 743, 745 (5th Cir. 2003)

(declining to read § 5845(b) in a manner that would artificially restrict its meaning).

Second, plaintiff impugns the good faith of ATF personnel and maintains that they exhibited bias in classifying the device as a machinegun. Appellant's Br. 26-28. This complaint is difficult to fathom. By August 2006, ATF had recognized that the Akins Accelerator was a highly dangerous device that transforms a rifle into the practical equivalent of a machinegun. D19-3, at 24 (AR 22). Concerned, ATF consulted with its attorneys to determine if it had legal authority to classify the device as a machinegun. D19-3, at 58 (AR 58) (noting that agency counsel "have just finished up legal research on the Akins Accelerator"). After confirming that it did, ATF moved promptly to adopt an interpretation that would best protect the public safety.² D19-4, at 17 (AR 114). There is not a shred of evidence to suggest that agency personnel were motivated by anything but a bona fide desire to better effectuate the congressional prohibition on machineguns.

Third, plaintiff appears to argue that ATF acted arbitrarily in changing its position on the proper classification of plaintiff's device. Appellant's Br. 14 ("This discrepancy begs the question: Was [ATF] wrong about the facts in 2003 or was it

² Plaintiff finds it suspicious that ATF did not re-test his device until after it opened its investigation. Appellant's Br. 27-28. Plaintiff nowhere explains how earlier testing would have affected ATF's decision given that the agency in fact completed testing before it issued its decision. D19-4, at 8 (AR 93).

wrong about the facts in 2006?"). As this Court explained in Gun South Inc., 877 F.2d at 862, however, ATF has the authority "to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration." As described above, ATF has offered a cogent explanation for its 2006 adoption of an interpretation of the phrase "single function of the trigger." D19-4, at 18-19 (AR 115-16). At the same time, ATF expressly "overruled" any "previous ATF rulings that are inconsistent with this determination." D19-4, at 19 (AR 116). ATF has thus satisfied its obligation to provide a "reasoned analysis for the change" in its position. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).³

³ Amici argue that ATF was required to provide notice and solicit comments before issuing its interpretation of the definition of "machinegun." Amicus Br. 16-17. Plaintiff has not raised this argument, and "arguments raised only by amici may not be considered." Richardson v. Alabama State Board of Education, 935 F.2d 1240, 1247 (11th Cir. 1991). Amici are in any event mistaken. ATF's decision was in the nature of an informal adjudication, not a rulemaking. See Gun South, Inc., 877 F.2d at 865 ("These activities which involve applying the law to the facts of an individual case, do not approach the function of rulemaking."). Even if the classification determination were a rulemaking, the APA specifically exempts "interpretative rule[s]" from notice and comment requirements. See 5 U.S.C. § 553(b) (A). The provision of 18 U.S.C. § 926 requiring notice and comment for substantive rulemakings in no way alters this analysis. As the Fourth Circuit has explained in considering § 926, "[a]bsent a clearer message from Congress * * *, we are hesitant to work a fundamental alteration in the relationship between the agency and the courts." National Rifle Association v. Brady, 914 F.2d 475, 479 (4th Cir. 1990).

C. Plaintiff's Criticism of the District Court's Opinion Is Misplaced And, in Any Event, Mistaken.

Plaintiff nonetheless urges that the district court's entry of summary judgment was inappropriate because, in his view, a genuine dispute of material fact remains. This misperceives the nature of an APA claim, however. As this Court has explained, "[t]he focal point for judicial review of an administrative agency's action should be the administrative record," and "a court conducting a judicial review is not generally empowered" to go beyond that record in reaching judgment. Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996) (internal quote omitted). Because "[t]he factfinding capacity of the district court is thus typically unnecessary," Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985), summary judgment "is particularly appropriate in cases in which the court is asked to review * * * the decision of a federal administrative agency," Florida Fruit & Vegetable Growers Ass'n v. Brock, 771 F.2d 1455, 1459 (11th Cir. 1985) (internal citations omitted). Plaintiff's effort to manufacture a fact question is thus beside the point.

In any event, what plaintiff characterizes as a factual dispute reflects, instead, his disagreement with the legal conclusion that ATF reached. Plaintiff argues that the government is factually mistaken in stating that "the rifle fires automatically with a single function [of] the trigger." Appellant's Br. 13. There is no disagreement, however, about the manner in which the device operates: it harnesses the recoil of a

semi-automatic weapon to allow it to rock hundreds of times per minute against a stationary trigger finger. Each time the trigger presses against the shooter's finger, another bullet is fired. See Appellant's Br. 3-5 (providing same explanation). ATF has taken the position that the single conscious act of pulling the trigger finger and instigating this automatic firing cycle constitutes "a single function of the trigger." Plaintiff's disagreement with that legal conclusion does not a factual dispute make.

Plaintiff also urges that summary judgment was inappropriate because the agency record was inadequate to allow for meaningful judicial review. Appellant's Br. 23-25. Specifically, plaintiff observes that portions of the record were withheld because they were privileged, and then reiterates his claim that the agency has failed adequately to explain its position that his device is a machinegun. The administrative record, however, provides a more-than-adequate basis for reviewing ATF's classification decision, see, e.g., D19-4, at 18-19 (AR 115-16), and the agency withheld only those documents subject to valid privileges (including the attorney-client privilege) and statutory confidentiality protections, see 26 U.S.C. § 6103.⁴ Plaintiff's

⁴ Plaintiff states that "[t]he government first asserted the existence and service of a privilege log * * * in its Reply Brief" in the district court. Appellant's Br. 23. This is incorrect. The table of contents for the administrative record that the government filed with the court clearly notes that "[a] copy of the privilege log will be supplied to plaintiff," D19-3, at 2, and the government did, in fact, provide plaintiff with a copy. In his brief to this Court, plaintiff "certifies * * *

unsupported allegations about the state of the record provide no basis for questioning the district court judgment.

II. THE CLASSIFICATION DETERMINATION DID NOT VIOLATE PLAINTIFF'S DUE PROCESS RIGHTS.

Plaintiff alleges that ATF's classification of his device as a "machinegun" violated his right to due process of law, both because ATF denied him an oral hearing and because the underlying statute is unconstitutionally vague. Neither claim has merit.

A. The Due Process Clause Imposes No Requirement to Provide Plaintiff with an Oral Hearing.

When ATF moved to classify plaintiff's device as a machinegun in November 2006, it carefully explained the basis for its decision. D19-4, at 8 (AR 93). One month later, ATF issued a ruling in which it concluded that "a single function of the trigger" encompassed "a single pull of the trigger." D19-4, at 17 (AR 114). Shortly thereafter, plaintiff took advantage of the opportunity to file objections and submitted a thirteen-page legal memo challenging the classification determination. D19-4, at 27 (AR 124). ATF carefully considered plaintiff's arguments, D19-4, at 57-62; D19-5, at 1-7 (AR 155-67), and ultimately "determined that the device should remain classified as a

that he has received no such privilege log." Appellant's Br. 24. Plaintiff has never raised this objection either formally (through a Rule 59(e) motion to amend or alter the judgment of the district court) or informally (in a request to government counsel for a copy of the privilege log). Because "[a]rguments not raised in the district court are waived," Johnson v. United States, 340 F.3d 1219, 1227 n.8 (11th Cir. 2003), this belated complaint does not warrant reversal.

machinegun for the reasons stated in the ruling," D19-5, at 31 (AR 190).

At no point in this agency process did the APA or any other provision of law require ATF to provide plaintiff with an oral hearing. See 5 U.S.C. § 554 (imposing a host of procedural strictures "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," but declining to impose similar strictures on informal adjudications). Plaintiff does not argue otherwise.

Instead, plaintiff maintains that the Due Process Clause independently necessitates an oral hearing when ATF moves to classify a device as a machinegun. As the Supreme Court explained in Mathews v. Eldridge, 424 U.S. 319 (1976), however, "[t]he essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." 424 U.S. at 348 (internal quote and correction omitted). Plaintiff has been provided with notice of the classification decision and an opportunity to challenge that decision. The Due Process Clause requires nothing more. See also National Rifle Association v. Brady, 914 F.2d 475, 485 (4th Cir. 1990) ("It is well-settled that the requirement of a hearing does not necessitate that the hearing be oral.").

The D.C. Circuit has rejected as "groundless" precisely this sort of due process claim. In Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120, 1134 (D.C. Cir. 2002), the issue was whether, in an informal agency adjudication downgrading a motor

carrier's safety rating, "not providing an oral hearing and discovery * * * violates the Due Process Clause of the Constitution." The court explained that

[i]t is clear that [the carrier] did receive due process here. The [agency] citation put [the carrier] on notice of the charges, [the carrier] had an opportunity to present its arguments through written briefs, and the carrier similarly had an opportunity to present evidence of the unreliability of toll receipts by affidavit. Procedural due process requires no more in this kind of administrative setting.

Id. at 1134. Plaintiff was likewise "on notice" of the classification and "had an opportunity" to challenge it. Id. His due process claim is thus similarly groundless.

Reference to the balancing test from Mathews only reinforces the conclusion that the Constitution does not independently require an oral hearing. As this Court has explained, the "Supreme Court's balancing test essentially requires [the Court] to weigh three factors: (1) the nature of the private interest; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in taking its action." Gun South, 877 F.2d at 867 (citing Mathews, 424 U.S. at 335). However substantial the plaintiff's pecuniary interest in selling his device, ATF's careful consideration of his written objections diminishes substantially "the risk of an erroneous deprivation" of that interest. Indeed, plaintiff cannot identify any factual error on the part of the agency that would have been amenable to correction in an oral hearing. Compare York v. Secretary of Treasury, 774 F.2d 417, 421 (10th Cir. 1985) (holding that the risk of error was low because the agency's determination is

"easily documented and not based to a significant extent upon witness credibility or other subjective determinations"). And there is no authority for the proposition that plaintiff was entitled to an oral hearing to challenge the legal basis for ATF's interpretation of the phrase "single function of the trigger." See Dredge Corp. v. Penny, 338 F.2d 456, 464 (9th Cir. 1964) (holding that "[t]he opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved").

Furthermore, the government has a strong interest in moving expeditiously to pull machineguns off the market. As this Court explained in Gun South, 877 F.2d at 867, "[t]he protection of the public's health and safety is a paramount government interest which justifies summary administrative action." The government's interest is all the more profound in this case given that plaintiff's device, if not classified as a machinegun, would be subject to no federal restrictions on its distribution or sale. Because the device permits a semi-automatic rifle to fire at a rate of 650 rounds per minute, the danger of permitting it to remain on the market is manifest. See United States v. Golding, 332 F.3d 838, 840 (5th Cir. 2003) (discussing the "risk * * * presented by the inherently dangerous nature of machineguns").⁵

⁵ Plaintiff speculates that ATF could have provided him with a pre-deprivation hearing without burdening the agency or delaying its decision. Appellant's Br. 33-34. Plaintiff is doubly mistaken: oral hearings divert agency resources away from other important tasks and, as a general rule, introduce delay into administrative proceedings. More importantly, however, his

B. The Statutory Definition of Machinegun Is Not Unconstitutionally Vague.

The definition of "machinegun" includes any device "designed and intended solely and exclusively" to permit a weapon "to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). This statutory text put plaintiff on notice that his device, which (in his words) "increase[s] the cyclic rate at which the trigger of a semi-automatic firearm can be actuated to discharge the weapon," D12, at 3, could well be a "machinegun." That is why plaintiff repeatedly contacted ATF to determine whether his device would be classified as a machinegun. D19-3, at 3 (AR 1); D19-3, at 7 (AR 5); D19-3, at 21 (AR 19).

Plaintiff nonetheless asserts that the statutory phrase "by a single function of the trigger" is so vague that its application to his device violates his constitutional right to due process of law. As the Supreme Court has explained, however, a statute is void for vagueness only where it fails to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited," Grayned v. City of Rockford, 408 U.S. 104, 108 (1972), "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative

unsupported conjecture ignores that, "in assessing what process is due, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of programs that the procedures they have provided assure fair consideration of the claims of individuals." In re Bleaufontaine, Inc., 634 F.2d 1383, 1387-88 (5th Cir. 1981) (internal quote, correction, and ellipses omitted).

standard, but rather in the sense that no standard of conduct is specified at all," Coates v. Cincinnati, 402 U.S. 611, 614 (1971). Because "[u]ncertainty is a fact of legal life," Coleman v. CIR, 791 F.2d 68, 71 (7th Cir. 1986), the Constitution's "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision," Rose v. Locke, 423 U.S. 48, 49 (1975) (per curiam).

Judged under these standards, § 5845(b) is unquestionably constitutional. Whatever ambiguities inhere in the phrase "single function of the trigger," it is undoubtedly a "comprehensible normative standard," Coates, 402 U.S. at 614, and gives "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," Hill v. Colorado, 530 U.S. 703, 732 (2000). Indeed, although the relevant language has been on the books for more than 70 years, see National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934), no court has ever held it unconstitutional. To the contrary, both the Fourth and Sixth Circuits have recently given short shrift to the argument that § 5845(b) is unconstitutionally vague. See United States v. Kelly, 276 Fed. Appx. 261, 267 (4th Cir. 2007); United States v. Carter, 465 F.3d 658, 664 (6th Cir. 2006); United States v. Williams, 364 F.3d 556, 560 (4th Cir. 2004).

Moreover, the Supreme Court held in Staples that an individual can be prosecuted for the unlawful possession of a machinegun only if he knew that the weapon in question was, in

fact, a machinegun. 511 U.S. 600; see also United States v. Nieves-Castano, 480 F.3d 597, 600 (1st Cir. 2007) ("The government correctly accepts that Staples's scienter requirement also applies to prosecutions under 18 U.S.C. § 922(o)."). As the Court has explained elsewhere, "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 & n.14 (1982). In the same vein, ATF's interpretation of the phrase "single function of the trigger" to encompass devices that, "once activated by a single pull of the trigger, initiate an automatic firing cycle which continues until either the finger is released or the ammunition supply is exhausted," D19-4, at 17 (AR 114), ameliorates any possible vagueness by providing plaintiff with clarity as to the proper interpretation of the phrase. See Go Leasing, Inc. v. NTSB, 800 F.2d 1514, 1525 (9th Cir. 1986) (holding that "potential vagueness may be mitigated by * * * executive interpretation of the challenged provision").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2008, I caused an original and six copies of the foregoing brief to be filed with the Court by Federal Express. On the same date, I also caused an electronic copy to be filed with the Court, and caused copies to be served on the following counsel by Federal Express and email:

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(5) and (6), I certify that this brief has been prepared in a fixed-spaced typeface using Corel WordPerfect 12 in 12-point Courier New font. I further certify that pursuant to Fed. R. App. P. 32(a)(7)(B) that the foregoing brief contains 6,692 words, according to the word count of Corel WordPerfect 12. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/
NICHOLAS BAGLEY

DECEMBER 2008

No. 08-15640-FF

**In The
United States Court of Appeals
for the Eleventh Circuit**

WILLIAM AKINS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

**On Appeal from the United States District Court
for the Middle District of Florida**

**BRIEF *AMICUS CURIAE* OF
GUN OWNERS FOUNDATION AND
GUN OWNERS OF AMERICA, INC.
IN SUPPORT OF APPELLANT**

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FOR THE ELEVENTH CIRCUIT

WILLIAM AKINS,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The undersigned counsel for the *amici curiae*, Gun Owners Foundation, *et al.*, certifies pursuant to Rules 26.1-1 and 28-1(b), Rules of the United States Court of Appeals for the Eleventh Circuit, that the following listed persons and entities, in addition to those listed in the Brief of Appellant previously filed herein, have an interest in the outcome of this case.

Bagley, Nicholas, counsel for Appellee

Gun Owners Foundation, Amicus Curiae in support of Appellant

Gun Owners of America, Inc., Amicus Curiae in support of Appellant.

Miles, John S., counsel for Amici Curiae

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Titus, Herbert W., counsel for *Amici Curiae*

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and Eleventh Circuit Rule 28-1(b), it is hereby certified that the *amici curiae*, Gun Owners Foundation and Gun Owners of America, Inc., are non-stock, nonprofit corporations, neither of which has any parent company, and no person or entity owns them or any part of them.

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INTEREST OF THE AMICI CURIAE

Gun Owners Foundation (“GOF”) and Gun Owners of America, Inc. (“GOA”) are nonprofit educational organizations, exempt from federal taxation under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, respectively, and each is dedicated, *inter alia*, to the correct construction, interpretation and application of the law, with particular emphasis on federal firearms statutes and constitutional guarantees related to firearm ownership and use.

GOF is a public charity which primarily engages in nonpartisan research and public education and assistance concerning the construction of constitutions and statutes related to the right of citizens to bear arms, and engages in public interest litigation in defense of human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. GOA is a social welfare organization which also engages in nonpartisan research and education, as well as assistance, regarding victims’ rights and certain public policy issues and public interest litigation, particularly that related to the correct construction of the Constitution and federal and state statutes. In the past, each of the *amici* has conducted research on other issues

involving the interpretation of federal law and has filed *amicus curiae* briefs in other federal litigation involving such issues.¹

STATEMENT OF ISSUE

Whether the district court erred, in violation of 5 U.S.C. section 706(2)(A), by its failure to hold unlawful and to set aside the Bureau of Alcohol, Tobacco and Firearms' Ruling that the Akins Accelerator is a machinegun, on the ground that such ruling was arbitrary, capricious, or not in accordance with 26 U.S.C. section 5845(b)'s definition of a machinegun?

SUMMARY OF ARGUMENT

At the heart of this appeal is the question whether the Bureau of Alcohol, Tobacco and Firearms ("ATF") acted arbitrarily, capriciously, or not in accord with the law when it ruled that the Akins Accelerator was a machinegun, as defined in 26 U.S.C. section 5845(b). It is submitted that the ATF ruling was wrong as a matter of law, and that the court below erred in upholding that ATF ruling.

In pertinent part, 26 U.S.C. section 5845(b) defines a machinegun as "any part designed and intended solely and exclusively ... for use in converting a

¹ *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

weapon [so that it] shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a **single function** of the trigger.” (Emphasis added.)

Initially, ATF concluded correctly that the Akins Accelerator was **not** a machinegun, having found that the accelerator enabled a semiautomatic weapon to increase its rate of fire by **multiple functions** of the trigger, including an initial pull of the trigger followed by a series of trigger movements interrupted by the placement of the trigger finger, each interruption of which caused the firearm to be discharged again. Out of an alleged concern for “public safety” threatened by a “dangerous weapon,” ATF changed its ruling, concluding that the Akins Accelerator was a machinegun because “a **single pull** of the trigger initiates an automatic firing cycle,” without the shooter having to repeatedly pull the trigger. (Emphasis added.)

ATF acknowledged that it was overruling its prior decisions (based on the statutory definition) that a machinegun was characterized as a weapon that fires “automatically” by a “**single function** of the trigger” and substituting a **new definition** of a machinegun (based on a new policy) as a weapon that fires automatically solely by a “**single pull** of the trigger” even if multiple trigger functions are required.

This decision exceeded ATF’s rulemaking authority under 18 U.S.C. section 926, having been made: (a) without proper notice and hearing; (b) in direct conflict with the statutory definition of a machinegun; and (c) without any support in either the legislative history or judicial precedent. To the contrary, the statutory language, legislative history, and judicial precedent conclusively demonstrate that “function” and “pull” are not equivalent. The Akins Accelerator did not cause a semiautomatic weapon to fire faster by “a single function” of the trigger; rather it enabled a semiautomatic weapon to increase its rate of fire only by faster multiple functions of the trigger.

In short, the ATF decision with respect to the Akins Accelerator was not in accordance with the statutory definition of a machinegun. ATF’s asserted concern for “public safety” does not permit it to disregard the federal firearms laws as they are written, particularly in view of the constitutional guarantee of the individual right to keep and bear arms and related protections.

ARGUMENT

I. The District Court’s Decision, Upholding the ATF Ruling that the Akins Accelerator Is a Machinegun, Was Arbitrary, Capricious, and Contrary to 26 U.S.C. Section 5845(b).

A “machinegun” is “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual

reloading, by a **single function** of the trigger.” 26 U.S.C. § 5845(b) (emphasis added). The statute further provides that “any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun” is, itself, a “machinegun.”

According to both the district court and the changed position of ATF, the Akins Accelerator qualifies as a machinegun because it converts a semiautomatic weapon so as to enable one to shoot that weapon “automatically” by a single “**pull of the trigger.**” *See* Order dated Sept. 23, 2008, pp. 10-12 (U.S. District Court, Middle District of Florida, Tampa Division, Case No. 8:08-cv-988-T-26TGW) (hereinafter “Dist. Ct. Order”); R. 29. *See also* ATF Rul. 2006-2 (Dec. 13, 2006).² The district court reached this result on the erroneous assumption that, **as a matter of law**, the “‘single **function** of the trigger’ is **synonymous** with ‘single **pull** of the trigger.’” *See* Dist. Ct. Order, p. 11 (emphasis added). Similarly, ATF assumed that, **as a matter of law**, “the National Firearms Act ... **equated** ‘single **function** of the trigger’ with ‘single **pull** of the trigger.’” *See* ATF Rul. 2006-2, p. 2 (emphasis added).

² ATF Ruling 2006-2 appears on pages A-1 through A-5 of the Appendix to this brief.

By substituting “**single pull**” for “**single function**” in the legal definition of a machinegun, both the district court and ATF concluded that, as a matter of law, it was irrelevant that the Akins Accelerator could not fire rapidly without **multiple functions** of the trigger. However, ATF admitted that “the trigger mechanically resets” between shots, as with all semi-automatic firearms. As ATF Ruling 2006-2 indicates, rapid fire could not be achieved by a “**single pull**” of the trigger **unless** the shooter continues to employ his finger to affect trigger function in discharging each round by maintaining “finger pressure against the stock” so that when “the trigger [again comes back into] contact [with] the shooter’s trigger finger” it continues to shoot “repeatedly until the ammunition is exhausted or the finger is removed.” *See* ATF Rul. 2006-2, p. 2; *accord*, Dist. Ct. Order, p. 10.

Thus, according to ATF and the district court, because the Akins Accelerator, “when installed in a semiautomatic rifle, results in a weapon that shoots more than one shot, without manual reloading, by a single **pull** of the trigger, [it is] a machinegun as defined in the National Firearms Act and the Gun Control Act.” ATF Rul. 2006-2, p. 2.

The ATF’s ruling that the Akins Accelerator is a machinegun was contrary to 5 U.S.C. section 706(2), in that it was arbitrary, capricious and not in accordance with the law defining a machinegun, as set forth in 26 U.S.C. section

5845(b), and the district court’s decision upholding that ruling was wrong as a matter of law.

A. The Akins Accelerator Enables a Weapon to Shoot Multiple Shots Only by Multiple “Functions” of the Trigger.

Although 26 U.S.C. section 5845(b) defines a machinegun in relation to a “**function**” of the trigger of a firearm, neither it nor any other statute defines “function.” “When a word is not defined by statute,” the “normal[] [rule is to] construe it in accord with its ordinary or natural meaning.” Smith v. United States, 508 U.S. 223, 228 (1993). Contrary to the assumption of both the district court and ATF, the meanings of “function” and “pull” are not the same. Webster’s Third New International Dictionary defines “**function**” as “one of a group of related actions contributing to a larger action” or “operation.” *Id.*, p. 921. By contrast, Webster’s defines “**pull**” to mean “to exert force upon so as to cause or tend to cause motion toward the force” or “tug at” in contrast to “push.” *Id.*, p. 1839. This distinction is clarified by firearms law expert Stephen Halbrook, who writes: “[w]hile pulling is the most prominent method of functioning a trigger, the term ‘function’ is not so limited.” S. Halbrook, Firearms Law Deskbook, Section 6:6, p. 446 (2008 Ed.) (hereinafter “Halbrook’s Deskbook”). Thus, Halbrook has observed that “a ‘single function of the trigger’ is broader than

a ‘single pull of the trigger,’ for a pull is only one type of function, which also includes, e.g., to push.” *Id.*

Indeed, in a letter dated February 22, 2008, addressed to a Mr. Michael Derdziak of Greenville, South Carolina, John R. Spencer, Chief, ATF Firearms Technology Branch (“FTB”), followed the normal use of these words when he wrote that, in its evaluation of “two stage trigger devices,” FTB has “interpreted the phrase ‘single function of the trigger’ to mean a single movement of the trigger, regardless of **whether** that movement is the manual (conscious) **pull** of the trigger **or** the manual (conscious) **release** of the trigger.” (Underline original; bold added.) Letter of John R. Spencer, Chief, Firearms Technology Branch, to Michael Derdziak, Feb. 22, 2008, 903050:MSK, 3111/2008-243.³ Applying that same interpretation of the meaning of “function” to the Akins Accelerator, which is at issue in this case, Halbrook writes:

The Akins Accelerator is a shoulder stock mechanism into which a particular semiautomatic firearm is installed, thereby facilitating rapid firing. **When the trigger is pulled**, this single function of the trigger causes the firearm to discharge. The resulting recoil pushes the entire firearm rearward within the stock. This movement of the entire firearm moves the trigger rearward away from the trigger finger (which is held in place against an integral stop built into the stock), allowing the trigger to reset. A compressed spring then pushes the

³ This letter appears on pages A-6 through A-7 of the Appendix to this brief.

entire firearm including the trigger forward, depressing the moving trigger against the stationary trigger finger. This results in **another separate single function of the trigger**, causing the firearm to discharge again. The cycle is then repeated. While the trigger finger remains stationary, the trigger itself moves back and forth for each shot fired. In short, only one shot is fired for each single function of the trigger. [Halbrook's Deskbook, Section 6:10, p. 479 (emphasis added).]

Not surprisingly, ATF, when in its initial determination it applied the same meaning of "function" to the Akins Accelerator, came to the same conclusion as Halbrook: the Akins Accelerator was not a machinegun:

The proposed theory of operation of this stock involves the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire. The shooter places his trigger finger behind the adjustable screws and forward of the weapon's trigger after **the weapon is initially fired** and the action is moved to the rear (by the recoiling mechanism), the subsequent forward movement of the action is halted by the shooter's trigger finger being held against the adjustable screws. **The trigger is then depressed and a second firing of the weapon commences.** The movements of the action within the stock assembly are used to **consecutively fire the weapon in lieu of the traditional method of manually pulling the trigger.** [Letter of Sterling Nixon, Chief, ATF Firearms Technology Branch, to Thomas Bowers, Nov. 17, 2003, 903050:RDC, 3311/2004-096; *see also* R. Vasquez, Assistant Chief, ATF Firearms Technology Branch, to Thomas Bowers, Nov. 22, 2004, 903050:MRC, 3311/2006-1060 cited in Halbrook's Deskbook, Section 6:10, pp. 479-80 (emphasis added).]

Yet, two years later, ATF changed its position, handing down ATF Ruling 2006-2, based not on any new discovery concerning the operation of the Akins

Accelerator, but, as found by the district court, based solely upon a policy change regarding its interpretation of the law:

In Ruling 2006-2, ATF explains that the motivation for its reconsideration of the earlier letters to Plaintiff came from requests by “several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm.”... The Ruling then sets forth a mechanical description of how such a device works (using the Akins Accelerator as an example) and reaches the important conclusion: “a single pull of the trigger initiates an automatic firing cycle.”... Next it outlines the **new policy, equating a “single function of the trigger” with a “single pull of the trigger,”** and connecting the **new interpretation** to the legislative history of the NFA.... Finally, Ruling 2006-2 recognizes that this interpretation represents a **policy change** and states “to the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled.” [Dist. Ct. Order, pp. 12-13 (emphasis added).]

Because the two terms — “pull” and “function” — “are not synonymous,” the interpretive “gloss” placed on 26 U.S.C. section 5845(b) “is not supported by the statute’s plain language” and, thereby, “impermissibly expands on the requirements of the statute.” *See National Rifle Association v. Brady*, 914 F.2d 475, 484 (4th Cir. 1990).

B. The ATF’s “New” Rule Defining “Single Function of the Trigger” to Mean “Single Pull of the Trigger” Is Not Entitled to Deference.

In justification of this change of legal policy — equating “single function of the trigger” to “single pull of the trigger” — **neither** ATF nor the district court

made any effort to examine whether ATF’s interpretation of the statutory text was consistent with the **intent of Congress**. Instead, the district court employed a “highly deferential” standard of review, concluding that ATF had provided sufficient “reasoned analysis,” thereby “demonstrating that its new interpretation of the phrase ‘single function of the trigger’ is necessary to protect the public from dangerous firearms.” Dist. Ct. Order, pp. 8-9, 12. The ATF ruling is not entitled to such deference.

1. ATF Has Limited Rule-Making Authority.

Currently, 18 U.S.C. section 926 authorizes ATF to “prescribe **only** such rules and regulations **as are necessary to carry out the provisions of this chapter....**” (Emphasis added.) Prior to the enactment of the Firearms Owners’ Protection Act (“FOPA”) in 1986, this provision read more broadly: “The Secretary **may prescribe** such rules and regulations **as he deems reasonably necessary** to carry out the provisions of this chapter....” *See* Pub. L. 90-618 (Gun Control Act of 1968), 82 Stat. 1213, 1226 (Oct. 22, 1968) (emphasis added). However, FOPA narrowed this grant of authority by adding the word, “**only**,” after “prescribe,” and substituting the phrase, “as are necessary” for “as he deems reasonably necessary.” *See* Pub. L. 99-308, 110 Stat. 449, 459 (May 19, 1986). This change of language, alone, confirms the district court’s error in ignoring the

statutory language in favor of ATF's policy change based upon its assessment that "its new interpretation of the phrase 'single function of the trigger' is necessary to protect the public from dangerous firearms." *See* Dist. Ct. Order, p. 12. As the court of appeals warned in NRA v. Brady, "[t]he change in language in Sec. 926 surely counsels BATF not to stray from the directives of the statute...." *Id.*, 914 F.2d at 479.

There is no catch-all "provision" in Chapter 44 of Title 18 of the United States Code that prohibits "dangerous firearms." Rather, the statutory provisions describe with great specificity all firearms subject to regulation. *See generally* 18 U.S.C. § 921(a). "Machinegun" is expressly stated to have "the meaning given such term in [26 U.S.C. section 5845(b)]." 18 U.S.C. § 921(a)(23). Thus, ATF is not authorized to substitute its "reasoned analysis" for the intent of Congress as specifically expressed by the statutory text defining a machinegun. Instead, it is "the existing statutory text" that is the "starting point in discerning congressional intent...." *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). ATF's task, as was the district court's, was "to construe what Congress has enacted[,] begin[ning], as always, with the language of the statute." Duncan v. Walker, 533 U.S. 167, 172 (2001).

This rule holds even in cases, such as this one, where “a court reviews an agency’s construction of the statute which it administers....” Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). In such cases:

First, **always**, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, **must** give effect to the unambiguously expressed intent of Congress. If, however, ... the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a **permissible construction of the statute**. [Chevron, 467 U.S. at 842-43 (emphasis added). *See also* NRA v. Brady, 914 F.2d at 478.]

Instead of complying with this threshold rule of Chevron, the district court leaped over the “statutory language” to ATF’s alleged expert “experience and reasoned analysis,”⁴ as if Congress had conferred “broad discretion” upon ATF, as it had upon the Environmental Protection Agency, as discussed in Chevron. *See* 467 U.S. at 845-62.⁵ Instead, the district court should have examined ATF’s new

⁴ *See* Dist. Ct. Order, p. 14.

⁵ *Compare* 42 U.S.C. section 4331(a) (Congressional declaration of national environmental policy “to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans”) *with* FOPA (Pub. L. 99-308, section 1) (Congressional findings affirming “the rights of citizens ... to keep and bear arms under the second amendment to the United States Constitution [and] to reaffirm

policy to ascertain whether it conformed with the “plain language of the statute.”

See NRA v. Brady, 914 F.2d at 484.

2. ATF’s Reliance on Legislative History Is Misplaced.

ATF has claimed — and the district court agreed — that the “legislative history” of the National Firearms Act supports the view that “single function of the trigger” means the same thing as “single pull of the trigger.” *See* ATF Rul. 2006-2, p. 2; Dist. Ct. Order, pp. 11-22. As Appellant points out in his brief, however, it is astonishing that the district court accepted “without question” ATF’s belated reliance upon “a [72-year old] snippet of testimony buried in the congressional record by a non-member of Congress.” Brief of Appellant (“Appl. Br.”), pp. 22-23.

Not only is the district court’s acceptance of such reliance surprisingly facile, it is directly contrary to a long-standing rule of the Supreme Court not to “accord any significance to ... statements” made by persons other than members of Congress or statements not included in “official Senate and House Reports.” *See Kelly v. Robinson*, 479 U.S. 36, 51, n.13 (1986). Indeed, in 2001, the Supreme Court applied this rule, dismissing an appeal to a 78-year old statement made by a

the intent of Congress ... that ‘it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms ... for lawful purposes.’”).

witness before a congressional subcommittee as the source of language that appeared in a statute:

Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and **speculate** upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. [Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120 (2001) (emphasis added).]

Yet ATF and the district court have done just the opposite, speculating that a portion of the testimony of the National Rifle Association (“NRA”) president, opposing the bill, taken out of context, transformed the meaning of the statutory “single function of the trigger” to be the “single pull of the trigger,”⁶ notwithstanding the fact that the NRA president testified that the single function of the trigger was the very “essence” of a machinegun, not the single pull of the trigger. *See* National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2d Sess., at 41 (1934).

In any event, speculation based on dusty congressional hearing transcripts is not helpful. The language of 26 U.S.C. section 5845(b) is “unambiguous,” so that there is no need to “resort to legislative history to determine what Congress

⁶ *See* ATF Rul. 2006-2; Dist. Ct. Order, pp. 11-12.

intended” the word “function” to mean. *See* Blaustein & Reich, Inc. v. Buckles, 365 F.3d 281, 288, n.15 (4th Cir. 2004).

3. ATF Failed to Comply with 18 U.S.C. Section 926(b).

Not only did the district court erroneously defer to ATF’s substantive decision changing its rules by equating “single function of the trigger” to “single pull of the trigger,” but it mistakenly deferred to the process by which ATF effectuated its change of policy. As Appellant has pointed out in his brief, ATF Ruling 2006-2 was not just an application of a preexisting rule, but the issuance of a new rule, subject to the notice and comment provisions of 5 U.S.C. section 553. *See* Applt. Br., p. 10. In its Case Background statement, the district court acknowledged that the ATF had, by Ruling 2006-2 , “issued a new policy statement” without having afforded any prior hearing. Dist. Ct. Order, pp. 6-7. The district court also acknowledged that this “new policy” is based upon a new rule that equates a “single function of the trigger” with a “single pull of the trigger.” Dist. Ct. Order, p. 13. Yet, the district court concluded that “the [Administrative Procedure Act’s] notice and comment requirements do not apply” because the ATF change of policy concerns only “interpretive rules,” not substantive ones. Dist. Ct. Order, p. 17.

Overlooked by the district court, however, is the requirement in 18 U.S.C. section 926(b) that — “before prescribing ... rules and regulations [as are necessary] to carry out the provisions of this chapter” — ATF “**shall** give not less than ninety days public notice, and shall afford interested parties opportunity for hearing....” (Emphasis added.) According to Gun South, Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989), section 926(b) applies when ATF “engages in rulemaking.” *Id.*, 877 F.2d at 865. If ATF’s Ruling 2006-2 was no more than an ATF decision “applying the law to the facts of an individual case,” then it would not “approach the function of rulemaking.” *See id.* But Ruling 2006-2 was more than that. It rested upon an entirely new policy that altered Akins’ “substantive rights” and, therefore, was rulemaking subject to the notice and hearing opportunity afforded by section 926(b). *See RSM, Inc. v. Buckles*, 254 F.3d 61, 69 (4th Cir. 2001).

C. ATF Ruling 2006-2 Is Not Supported by Judicial Precedent.

Citing Staples v. United States, 511 U.S. 600 (1994) and United States v. Camp, 343 F.3d 743 (5th Cir. 2003), the district court affirmed ATF’s claim that “common-sense determination” that equated “single pull of the trigger” with “single function of the trigger” was reasonable. Dist. Ct. Order, p. 11. As pointed out in Appellant’s Brief, neither case supports ATF’s view.

Without the slightest hesitation, the district court boldly, but erroneously, proclaimed that, in Staples, “[t]he Supreme Court has **adopted the view** that ‘single function of the trigger’ is **synonymous** with ‘single pull of the trigger.’” Dist. Ct. Order, p. 11 (emphasis added). As Appellant points out in his brief, the question of whether “function” means “pull” was not before the Staples Court. Applt. Br., p. 22. Indeed, as the paragraph in Staples upon which the district court relied stated, the issue addressed by the Staples Court was the meaning of the word “automatic[ally],” not of the word “function.” See Staples, 511 U.S. at 602, n.1. Since the weapon at issue in Staples fired only by a “pull” of the trigger, the Court simply “used” pull, rather than function, because pull was a convenient shorthand way to describe how the weapon operated, wholly unrelated to the issue that was before the Court.

As for Camp, the district court simply ignored the court of appeals’ discussion of its prior decision in United States v. Jokel, 969 F.2d 132 (5th Cir. 1992), wherein the court had concluded that just because a firearm did not shoot, “as is traditional, [by] pulling a small lever,” it would be error ““to impute to Congress the intent to restrict the term to apply to only one kind of trigger, albeit a very common kind. *The language implies no intent to restrict the meaning*”” Camp, 343 F.3d 743, 745 (5th Cir.2003) (italics original). Yet, as pointed out in

Appellant's Brief, that is exactly what ATF Ruling 2006-2 would do if applied consistently to firearms that shoot automatically by some operation other than a "pull" of the trigger. *See* Applt. Br., p. 22.

Moreover, prior to the issuance of ATF Ruling 2006-2, courts of appeals in both the Seventh and Ninth federal circuits had decided cases demonstrating that the trigger function element of a machinegun included more than a "pull" of the trigger; to construe it otherwise "would lead to the absurd result of enabling persons to avoid the National Firearms Act simply by using weapons that employ a button or switch mechanism for firing." United States v. Evans, 978 F.2d 1112, 1113, n.2 (9th Cir. 1992). *Accord* United States v. Fleischli, 305 F.3d 643, 655 (7th Cir. 2002). Surely, it would be equally absurd for ATF to rule in the future that such weapons that employ a "button or switch mechanism for firing" would not be machineguns because they do not shoot automatically by a single "pull" of the trigger.

D. ATF's Ruling 2006-2 Cannot Be Justified by the Need "to Protect the Public from Dangerous Firearms."

The district court found support for ATF Ruling 2006-2 in ATF's assessment that the Akins Accelerator threatened the "public safety," by enabling a semiautomatic weapon to shoot at an increased rate of fire. *See* Dist. Ct. Order,

p. 12. After all, a machinegun is not defined by statute as a weapon which can be operated so that it fires real fast. *See* Dist. Ct. Order, p. 17 (at “a high rate of fire....”). Moreover, it is not within ATF’s authority to balance the interests of societal safety and firearms use and ownership. Rather, it is ATF’s duty to enforce the federal firearms laws as they are written and as they are constitutionally permitted by the Second, Fourth, Fifth, Ninth, and Tenth Amendments. *See* Pub. L. 99-308, section 1, 100 Stat. 449 (May 19, 1986).

In Staples, the Supreme Court construed 26 U.S.C. section 5861(d)’s prohibition against the possession of an unregistered machinegun to require the government to prove beyond a reasonable doubt that the possessor “know[s] of the particular characteristics that make his weapon” a machinegun. Staples, 511 U.S. at 609. In so ruling, the Court rejected the government’s plea that it would be enough that the prosecution show that the person possessing a firearm knew that it was a “dangerous” instrumentality. *Id.*, 511 U.S. at 611. It did so because firearms laws should be interpreted and applied with respect for the “long tradition of widespread lawful gun ownership by private individuals in this country.” *Id.*, 511 U.S. at 610.

Since Staples, the Supreme Court has decided that the Second Amendment protects an **individual** right to keep and bear arms. District of Columbia v. Heller,

554 U.S. ___, 171 L. Ed.2d 637 (2008). In so ruling, the Court likened the right to keep and bear arms to the First Amendment freedoms of religion, speech, press, assembly, and petition, deserving the same high protection as those rights. *Id.*, 171 L.Ed. 2d at 683. More specifically, the Court rejected the notion that Second Amendment rights could be subject to “gun control” laws measured by an “interest-balancing” formula that would justify restrictions on gun ownership in light of an overriding governmental interest in public safety. *Id.*, 171 L.Ed.2d at 682-83. To subject the Second Amendment constitutional guarantee to such judicial “assessments,” the Court concluded, would make it “no constitutional guarantee at all.” *Id.*, 171 L.Ed.2d at 683. To allow ATF to stretch the reach of Congressionally-crafted firearms laws in the name of “public safety” — as the district court did here — would be to allow ATF to do what the Heller Court, itself, refused to do, because “the enshrinement of [the] constitutional right[] [to keep and bear arms] necessarily takes certain policy choices off the table.” *Id.*, 171 L.Ed.2d at 684.

CONCLUSION

For the reasons stated, the ATF ruling that the Akins Accelerator is a machinegun was arbitrary, capricious, and not in accordance with the statutory

definition of a machinegun as set forth in 26 U.S.C. section 5845(b). The district court's decision and judgment upholding that ruling should be reversed.

Respectfully submitted,

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November 26, 2008
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Gun Owners Foundation and Gun Owners of America, Inc. in Support of Appellant complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 4,963 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 14-point Time New Roman.

William J. Olson
Attorney for *Amici Curiae*

Dated: November 26, 2008

APPENDIX

APPENDIX TABLE OF CONTENTS

1. Bureau of Alcohol, Tobacco, Firearms and Explosives Ruling 2006-2
2. Letter of John R. Spencer, Chief, Firearms Technology Branch, to Michael Derdziak, Feb. 22, 2008, 903050:MSK, 3111/2008-243

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES
RULING 2006-2

18 U.S.C. 922(o): Transfer or possession of machinegun

26 U.S.C. 5845(b): Definition of machinegun

18 U.S.C. 921(a)(23): Definition of machinegun

The definition of machinegun in the National Firearms Act and the Gun Control Act includes a part or parts that are designed and intended for use in converting a weapon into a machinegun. This language includes a device that, when activated by a single pull of the trigger, initiates an automatic firing cycle that continues until the finger is released or the ammunition supply is exhausted.

ATF Rul. 2006-2

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has been asked by several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm. These devices, when attached to a firearm, result in the firearm discharging more than one shot with a single function of the trigger. ATF has been asked whether these devices fall within the definition of machinegun under the National Firearms Act (NFA) and Gun Control Act of 1968 (GCA). As explained herein, these devices, once activated by a single pull of the trigger, initiate an automatic firing cycle which continues until either the finger is released or the ammunition supply is exhausted.

Accordingly, these devices are properly classified as a part “*designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun*” and therefore machineguns under the NFA and GCA.

The National Firearms Act (NFA), 26 U.S.C. Chapter 53, defines the term “firearm” to include a machinegun. Section 5845(b) of the NFA defines “machinegun” as “*any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.*” The Gun Control Act of 1968 (GCA), 18 U.S.C. Chapter 44, defines machinegun identically to the NFA. 18 U.S.C. 921(a)(23). Pursuant to 18 U.S.C. 922(o), machineguns manufactured on or after May 19, 1986, may only be transferred to or possessed by Federal, State, and local government agencies for official use.

ATF has examined several firearms accessory devices that are designed and intended to accelerate the rate of fire for semiautomatic firearms. One such device

consists of the following components: two metal blocks; the first block replaces the original manufacturer's V-Block of a Ruger 10/22 rifle and has attached two rods approximately $\frac{1}{4}$ inch in diameter and approximately 6 inches in length; the second block, approximately 3 inches long, $1\frac{3}{8}$ inches wide, and $\frac{3}{4}$ inch high, has been machined to allow the two guide rods of the first block to pass through. The second block supports the guide rods and attaches to the stock. Using $\frac{1}{4}$ inch rods, metal washers, rubber and metal bushings, two collars with set screws, one coiled spring, C-clamps, and a split ring, the two blocks are assembled together with the composite stock. As attached to the firearm, the device permits the entire firearm (receiver and all its firing components) to recoil a short distance within the stock when fired. A shooter pulls the trigger which causes the firearm to discharge. As the firearm moves rearward in the composite stock, the shooter's trigger finger contacts the stock. The trigger mechanically resets, and the device, which has a coiled spring located forward of the firearm receiver, is compressed. Energy from this spring subsequently drives the firearm forward into its normal firing position and, in turn, causes the trigger to contact the shooter's trigger finger. Provided the shooter maintains finger pressure against the stock, the weapon will fire repeatedly until the ammunition is exhausted or the finger is removed. The assembled device is advertised to fire approximately 650 rounds per minute. Live-fire testing of this device demonstrated that a single pull of the trigger initiates an automatic firing

cycle which continues until the finger is released or the ammunition supply is exhausted.

As noted above, a part or parts designed and intended to convert a weapon into a machinegun, *i.e.*, a weapon that will shoot automatically more than one shot, without manual reloading, by a single function of the trigger, is a machinegun under the NFA and GCA. ATF has determined that the device constitutes a machinegun under the NFA and GCA. This determination is consistent with the legislative history of the National Firearms Act in which the drafters equated “single function of the trigger” with “single pull of the trigger.” *See, e.g., National Firearms Act: Hearings Before the Comm. on Ways and Means, House of Representatives, Second Session on H.R. 9066, 73rd Cong., at 40 (1934).*

Accordingly, conversion parts that, when installed in a semiautomatic rifle, result in a weapon that shoots more than one shot, without manual reloading, by a single pull of the trigger, are a machinegun as defined in the National Firearms Act and the Gun Control Act.

Held, a device (consisting of a block replacing the original manufacturer’s V-Block of a Ruger 10/22 rifle with two attached rods approximately ¼ inch in diameter and approximately 6 inches in length; a second block, approximately 3 inches long, 1 ⅜ inches wide, and ¾ inch high, machined to allow the two guide rods of the first block to pass through; the second block supporting the guide rods

and attached to the stock; using ¼ inch rods; metal washers; rubber and metal bushings; two collars with set screws; one coiled spring; C-clamps; a split ring; the two blocks assembled together with the composite stock) that is designed to attach to a firearm and, when activated by a single pull of the trigger, initiates an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted, is a machinegun under the National Firearms Act, 26 U.S.C. 5845(b), and the Gun Control Act, 18 U.S.C. 921(a)(23).

Held further, manufacture and distribution of any device described in this ruling must comply with all provisions of the NFA and the GCA, including 18 U.S.C. 922(o).

To the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled.

Date approved: December 13, 2006

Michael J. Sullivan

Director



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

FEB 22 2008

Martinsburg, WV 25401
www.atf.gov903050:MSK
3111/2008-243

Mr. Michael Derdziak
108 Crockwood Ct
Greenville, South Carolina 29607

Dear Mr. Derdziak:

This refers to your faxed correspondence dated January 23, 2008, to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Firearms Technology Branch (FTB), in which you ask whether a semiautomatic rifle equipped with a manually operated device which allows its "host rifle" to fire a single round when the trigger is pulled and a single round when the trigger is released would be classified as a "machinegun" as defined in the National Firearms Act (NFA). This device is generally referred to as a "two-stage trigger device."

For your information, the NFA, 26 U.S.C. § 5845(b), defines a "machinegun" as follows:

...any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

In the past, FTB has evaluated these types of devices and has interpreted the phrase "single function of the trigger" to mean a single movement of the trigger, regardless of whether that movement is the manual (conscious) pull of the trigger or the manual (conscious) release of the trigger.

Thus, fitting a two-stage trigger device to a semiautomatic firearm which enables the weapon to fire a single shot when the trigger is manually (consciously) pulled by the user's finger and another single shot when the trigger is manually (consciously) released by the user's finger would not create a weapon classified as a machinegun under the NFA (§ 5845(b)). In addition, such a trigger device, by itself, would not be regulated under NFA provisions.

-2-

Mr. Michael Derdziak

Please note that this determination is dependent on two important points.

1. That the operator/user of the device is consciously manipulating the trigger for each pull and release. Any device (whether commercially manufactured or homemade) which accelerated the movement of the trigger or forced the trigger into the trigger finger of the operator at such a speed that the operator would be unaware of the finger movement (i.e., would not be voluntarily/consciously pulling the trigger himself) would result in the creation of a weapon that would be classified as a "machinegun" as defined above.
2. That only a single shot is fired for each pull and release of the trigger. If each pull and release of the trigger resulted in more than one shot being fired, the weapon fitted with such a device would be classified as a "machinegun" as defined in the NFA.

We thank you for your inquiry and trust the foregoing has been responsive to your request for information.

Sincerely yours,


John R. Spencer
Chief, Firearms Technology Branch

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners Foundation and Gun Owners of America, Inc. in Support of Appellant was made, this 26th day of November, 2008, by depositing sufficient hard copies of the brief in the United States Mail, First-Class, postage prepaid, addressed to the attorneys of record for the parties, as follows:

John R. Monroe, Esquire
9640 Coleman Road
Roswell, GA 30075
Counsel for Plaintiff-Appellant William Akins

and

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Civil Division
U.S. Department of Justice
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Washington, D.C. 20530

William J. Olson

To: (b) (6) (OAG) (JMD) (b) (6)
Cc: (b) (6) (ODAG) (JMD) (b) (6)
From: Allen, Joseph J.
Sent: Wed 10/4/2017 6:34:28 PM
Subject: Akins District Court Litigation Pleadings
[Akins Civil Complaint.pdf](#)
[Akins Dismissal Order.pdf](#)
[Akins Govt Reply in support of MTD SJ.pdf](#)
[Akins Govt Mot to Dismiss.pdf](#)
[Akins' Plt Statement of Disputed Facts.pdf](#)
[Akins' Rsp MTD SJ.pdf](#)

(b) (6) Attached are the primary substantive pleadings from the District Court (MDFL) litigation in Akins. I will sent the appellate pleadings separately (files too large for the in-box in one email).

Thanks, Joe

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM AKINS,)	
)	
Plaintiff,)	CIVIL ACTION FILE NO.
)	
v.)	_____
)	
THE UNITED STATES)	
)	
Defendant.)	

COMPLAINT – INJUNCTIVE RELIEF SOUGHT

I. INTRODUCTION

1. This action seeks a declaratory judgment that a certain decision of the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (“BATFE”), was arbitrary, capricious, without factual support and contrary to law, together with an appropriate injunction. In the alternative, Plaintiff seeks a declaration that 26 U.S.C. § 5845(b) is unconstitutional on its face and as applied to Plaintiff, with an appropriate injunction.

II. JURISDICTION & VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. 1346(a)(2).
3. Venue is proper because Plaintiff resides in this District and in this Division, and Defendant is present in this District and in this Division.

III. PARTIES

4. Plaintiff is a United States citizen and legal resident of Pasco County, Florida.
5. Plaintiff sues in his own right and as successor in interest to Akins Group, Inc., a corporation organized under the laws of the State of Oregon, and which has been dissolved. Unless otherwise indicated, references to “Plaintiff” in this Complaint include Plaintiff as successor to Akins Group, Inc.
6. The Defendant is the United States.

IV. FACTUAL BACKGROUND

7. On or about August 15, 2000, the United States Patent and Trademark Office issued Patent No. 6,101,918, for a device later to be called the “Akins Accelerator” to Plaintiff William Akins. The purpose of the

Akins Accelerator was “to increase the rate at which the trigger of a semi-automatic firearm can be actuated to discharge the weapon.” As used throughout this Complaint, the term “Akins Accelerator” refers both to the subject of the Patent and the device manufactured and distributed by that name.

8. An abstract of the Patent is attached as **Exhibit A**.
9. On or about March 31, 2002, Akins submitted his Patent to the Firearms Technology Branch of the BATFE, for a classification of the Akins Accelerator under the National Firearms Act, 26 U.S.C. § 5801, *et. seq.* In particular, Akins inquired if the BATFE would consider the Akins Accelerator to be a machine gun as defined by 26 U.S.C. § 5845(b).
10. A copy of Akins’ letter is attached as **Exhibit B**.
11. On or about July 28, 2003, the BATFE wrote Akins requesting a sample of the device (it did not yet have the name “Akins Accelerator”).
12. A copy of the July 28 letter (the “First BATFE Letter”) is attached as **Exhibit C**.
13. On or about October 20, 2003, the BATFE inexplicably wrote Akins a virtually identical letter to the First BATFE Letter.

14. A copy of the October 20, 2003 letter (the “Second BATFE Letter”) is attached as **Exhibit D**.
15. On or about August 21, 2003, the BATFE received a prototype of the Akins Accelerator from Akins’ business associate, Thomas Bowers.
16. On or about November 17, 2003, the BATFE wrote Bowers a letter stating that “the submitted stock assembly does not constitute a machinegun as defined in the NFA.”
17. A copy of the November 17 letter (the “Third BATFE Letter”) is attached as **Exhibit E**.
18. On or about January 21, 2004, Bowers wrote the BATFE requesting clarification of the Third BATFE Letter. In particular, Bowers inquired whether the determination that the device was not a machine gun was because the “crude sample” Bowers sent for examination did not operate as a machine gun, or because the BATFE was able to classify the device based on the intended design and operation.
19. A copy of Bowers letter is attached as **Exhibit F**.
20. On or about January 29, 2004, the BATFE replied to Bowers, stating, “Our classification of the stock assembly was rendered despite the fact

that [the device did not function as designed]. The theory of operation was clear even though the rifle/stock assembly did not perform as intended.”

- 21 . A copy of the January 29 letter, (the “Fourth BATFE Letter”) is attached as **Exhibit G**.
- 22 . 18 U.S.C. § 922(o) prohibits manufacture and distribution of machine guns to anyone other than federal, state, or local law enforcement agencies, or another manufacturer of machine guns. Because of the provisions of 18 U.S.C. § 922(o), the classification of a new (after 1986) device as a machine gun precludes its manufacture for general citizen purchase. Conversely, the classification of a device as not a machine gun opens the door to mass production and distribution.
- 23 . Because the Akins Accelerator is a stock assembly to attach to a separate rifle, the Akins Accelerator is not subject to the regulatory jurisdiction of the BATFE at all if the Akins Accelerator is not a machine gun.
- 24 . Based on the BATFE’s classification that the Akins Accelerator is not a machine gun, Akins and Bowers began mass production and distribution

of Akins Accelerators through Akins' predecessor in interest, Akins Group, Inc.

25. On or about November 22, 2006, more than three years after BATFE's determination that the Akins Accelerator is not a machine gun, the BATFE wrote Bowers, as CEO of Akins Group, Inc., a letter advising him that the BATFE had examined an Akins Accelerator and determined that it is a machine gun. The letter also stated that the Third and Fourth BATFE Letters "are hereby overruled." The letter advised Bowers that Akins Group, Inc. either had to register its Akins Accelerators on hand as machine guns in accordance with 26 U.S.C. § 5822 or surrender them.
26. A copy of the November 22 letter (the "Fifth BATFE Letter") is attached as **Exhibit H**.
27. On or about December 13, 2006, the BATFE issued a generic ruling, ATF Rul. 2006-2, describing the Akins Accelerator and declaring it to be a machine gun.
28. A copy of ATF Rul. 2006-2 is attached as **Exhibit I**.

29. On or about February 6, 2007, counsel for Akins Group, Inc. requested reconsideration of the BATFE's classification of the Akins Accelerator as a machine gun.
30. A copy of that request is attached as **Exhibit J**.
31. On or about September 24, 2007, the BATFE responded to the request for reconsideration, stating that "the device should remain classified as a machinegun...."
32. A copy of the September 24 letter (the "Sixth BATFE Letter") is attached as **Exhibit K**.
33. Prior to the BATFE's issuance of the Fourth BATFE letter, Plaintiff Akins personally acquired four Akins Accelerators.
34. On or about January 19, 2007, BATFE required Akins Group, Inc. to remove recoil springs from all Akins Accelerators in inventory and surrender them to BATFE.
35. On or about January 19, 2007, BATFE required Plaintiff Akins to remove recoil springs from his personal Akins Accelerators and surrender them to BATFE.

36. The Akins Accelerator is non-functional and has no value without the spring that was confiscated by Defendant.

37. On or about February 18, 2008, Akins Group, Inc. assigned all rights and interests in claims it may have against Defendant to Plaintiff.

38. An Akins Accelerator, when intact with springs as designed and manufactured, and when attached to a weapon for which it is intended, does not shoot, is not designed to shoot, and cannot be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.

39. An Akins Accelerator, when intact with springs as designed and manufactured, and when attached to a weapon for which it was intended, requires a separate function of the trigger for every shot discharged.

40. The Akins Accelerator, when intact with springs as designed and manufactured, is not a machine gun as defined by 18 U.S.C. 921 and 26 U.S.C. § 5845(b).

Count I – Violation of Due Process

41. By determining that Plaintiff's property was a machine gun without a hearing, Defendant failed to provide Plaintiffs with the due process of law.

42. In classifying the Akins Accelerator as a machine gun, Defendant acted arbitrarily, capriciously, and without factual basis.

43. In the alternative, 26 U.S.C. § 5845(b) is unconstitutionally vague on its face and as applied to Plaintiff.

Demand for Relief

Plaintiff demands the following relief:

1. A declaration that the Akins Accelerator is not a machine gun.
2. An injunction prohibiting Defendant from treating the Akins Accelerator as a machine gun for any purpose.
3. In the alternative, a declaration that 26 U.S.C. § 5845(b) is unconstitutionally vague on its face and as applied to Plaintiff.
4. In the alternative, an injunction prohibiting Defendant from applying 26 U.S.C. 5845(b) so as to treat the Akins Accelerator as a machine gun.
5. Costs of bringing and maintaining this action, including attorney's fees.
6. Any other relief the Court deems proper.

Dated May 19, 2008

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ATTORNEY FOR PLAINTIFF

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

WILLIAM AKINS,

Plaintiff,

v.

CASE NO: 8:08-cv-988-T-26TGW

UNITED STATES OF AMERICA,

Defendant.

ORDER

This cause comes before the Court on Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment, which is accompanied by the administrative record of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or "BATFE") (Dkt. 19) and Plaintiff's Response in Opposition, which is accompanied by a Statement of Disputed Facts and exhibits (Dkt. 25). Defendant has also filed a Reply to the Response. (Dkt. 28.)

Summary Judgment Standard

The parties have submitted many exhibits for the Court's consideration in these proceedings and, thus, Defendant's instant Motion will be treated as a motion for summary judgment. See Poole v. Rich, 2008 WL 185527, at *2 (11th Cir. 2008) (reaffirming the general rule that whenever a judge considers matters outside the pleadings in a 12(b)(6) motion, that motion is converted to Rule 56 motion for summary judgment). Summary judgment is appropriate where there is no genuine issue of material

fact. Fed.R.Civ.P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (citation omitted). On a motion for summary judgment, the court must review the record, and all its inferences, in the light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Having done so, the Court finds that Defendant's Motion for Summary Judgment is due to be granted. Defendant's memoranda are thorough and well-reasoned and, therefore, portions of them will be incorporated herein.

Case Background

The Gun Control Act ("GCA") prohibits any person from "possess[ing] a machinegun" manufactured after May 19, 1986, subject to a limited exception for law enforcement agencies. 18 U.S.C. § 922(o). Congress drew upon the definition of "machinegun" as found in the National Firearms Act ("NFA"), Internal Revenue Code of 1954, 26 U.S.C. § 5845, which defines the term as follows:

any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled, if such parts are in the possession or under the control of a person.

See 18 U.S.C. §§ 921(a)(23), 922(b); 26 U.S.C. § 5845; see also 27 C.F.R. 478.11; 479.11. Manufacturers of machineguns are required to register in accordance with 26 U.S.C. § 5822 and may only manufacture them for the use of a Federal or state department or agency. See 18 U.S.C. § 922(o). Congress has delegated the authority to regulate under the NFA to ATF. See 27 C.F.R. § 479; U.S. v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725, 416 F.3d 977 (9th Cir. 2005) (recognizing delegation of authority to ATF).

In 1998, Plaintiff developed an “apparatus for accelerating the cyclic firing rate of a semi-automatic firearm,” and applied for a patent from the United States Patent and Trademark Office. (Dkt. 12, Ex A.) On August 15, 2000, Plaintiff received Patent No. 6,101,918 for his device, which he subsequently named the “Akins Accelerator.” (Id. at Ex. B; Dkt. 12, ¶ 7.) Plaintiff wrote to the Firearms Technology Branch (“FTB”) of ATF on March 31, 2002, enclosing a copy of his patent abstract, to inquire as to whether the device would be classified as a machinegun. (Dkt. 12, Ex. B.)

On July 28, 2003, FTB asked that Plaintiff submit a sample of the device and on August 21, 2003, Thomas Bowers (“Bowers”), Plaintiff’s business associate, submitted a prototype to FTB. (Dkt. 1, ¶ 15.) FTB examined the Akins Accelerator prototype, installed it in an SKS-type rifle, and test-fired it. (Dkt. 12, Ex. E.) On the second test-firing, the prototype broke. (Id.) Notwithstanding, FTB determined that “the submitted stock assembly does not constitute a machinegun . . . [nor] a part or parts designed and intended for use in converting a weapon into a machinegun.” (Id.) FTB informed Mr.

Bowers of its conclusion in a November 17, 2003 letter, noting that the “weapon did not fire more than one shot by a single function of the trigger.” (Id.)

On January 21, 2004, Bowers submitted a second letter, wherein he expressed “confusion” over the meaning of the November 17, 2003 letter and asked FTB to “clearly state[]” its opinion on the “application of the principle of operation” of the Akins Accelerator, not just on the physical prototype itself. (Dkt. 12, Ex. F.) FTB replied to Mr. Bowers’ letter on January 29, 2004, describing the device’s “proposed theory of operation” as “the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire.” (Dkt. 12, Ex. G.) The letter then stated that the “classification of the stock assembly was rendered despite the breakage of the prototype,” noting that “[t]he theory of operation was clear even though the rifle/stock assembly did not perform as intended.” (Id.) The letter emphasized, however, that its conclusions were “valid provided that when the stock is assembled with an otherwise unmodified SKS semiautomatic rifle, the rifle does not discharge more than one shot by a single function of the trigger.” (Id.) Based on FTB’s classification that the Akins Accelerator was not a machinegun, Plaintiff began mass production and distribution of the devices through Plaintiff’s predecessor in interest, Akins Group, Inc.

On August 18, 2006, a website that Plaintiff was using to sell the Akins Accelerator came to the attention of ATF. (Dkt. 19, R. 25.)¹ The website advertised the

¹ Citations to pages in the administrative record (Dkt. 19) are signaled throughout this Order with “R.”

device as “Evaluated by FTB/USDOJ/BATFE” and quoted from FTB’s letters and the NFA. (R. 25-26.) Shortly thereafter, an Akins Accelerator customer wrote the FTB and requested “a written determination” of whether the device, “assembled with a standard Ruger 10/22 semiautomatic carbine as described by the manufacturer,” would constitute a machinegun within the NFA.² (R. at 27-28.) The letter expressed concern that the earlier letters to Mr. Bowers did not “specifically include the use of the device with a standard Ruger 10/22 semiautomatic carbine.” (Id.) Around the same time, FTB received requests to evaluate other devices designed to accelerate the rate of fire of a semiautomatic firearm, including one to be used in conjunction with an AK-47 type semiautomatic rifle. (R. 50-52.)

On September 22, 2006, ATF opened an investigation into the then being sold Akins Accelerator. (Id. at R. 54.) ATF obtained a retail-model device on October 6, 2006, and forwarded it to FTB on October 11, 2006. (Id.) Following a test-firing of the retail-model device, FTB wrote to Bowers on November 22, 2006, and advised him that it had tested the device with a Ruger 10/22 rifle and “demonstrated that a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.” (Dkt. 12, Ex. H.) The letter also noted that “[t]he Akins device assembled with a Ruger 10/22 is advertised to fire approximately 650 rounds per minute,” and concluded that the device must be

² See 26 U.S.C. § 5845(a) (defining “firearm”).

classified as a machinegun. (Id.) FTB stated that its prior letters “are hereby overruled” and advised Plaintiff to either register its Akins Accelerators on hand as machineguns in accordance with 26 U.S.C. § 5822 or surrender them. (Id.)

Then, on December 13, 2006, ATF issued a new policy statement, ATF Ruling 2006-2, out of concern for the public safety implications of other, similar devices. (Dkt. 12, Ex. I.) In that statement, ATF explained that “conversion parts that, when installed in a semiautomatic rifle, result in a weapon that shoots more than one shot, without manual reloading, by a single pull of the trigger, are a machinegun as defined in the National Firearms Act and the Gun Control Act.” (Id.) In addition, ATF provided a description of the Akins Accelerator, and held that such a device would be classified as a machinegun. (Id.)

On January 19, 2007, ATF required Plaintiff to remove recoil springs from his personal Akins Accelerators and surrender them. (Dkt. 1, ¶ 35.) On February 6, 2007, Plaintiff, through counsel, requested that FTB reconsider its classification of the Akins Accelerator as a machinegun. (Dkt. 12, Ex. J.) The request for reconsideration asserted that... “[i]f . . . the trigger finger remains in contact with the trigger, only one shot can result until the trigger is released and then pressed again.” (Id.) It also observed that a number of other devices have not been classified as machineguns, including devices that fire two or three shots with a single pull of the trigger. (Id.; R. 132.) The request for reconsideration emphasized that the agency’s original classification of the Akins Accelerator was “consistent” with “long-standing agency interpretations.” (Id.; R. 135.)

In conjunction with his request that ATF reconsider Ruling 2006-2, Plaintiff requested the opportunity “to present [his] case orally” to ATF. (R. 147.) On September 24, 2007, ATF issued a letter upholding that the machine gun classification without a hearing. (Dkt. 12, Ex. K.)

On February 18, 2008, Akins Group, Inc., assigned all rights and interests in claims it may have against the Government to Plaintiff. (Dkt. 1, ¶ 37.) On March 6, 2008, Akins filed a lawsuit in the Court of Federal Claims, requesting compensation under the Takings Clause of the Fifth Amendment, as well as declaratory and injunctive relief reversing ATF’s classification of the Akins Accelerator. See Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) (No. 1). On May 2, 2008, the United States moved to dismiss the case, arguing with respect to Akins’ declaratory and injunctive relief claims that the Court of Federal Claims lacked jurisdiction to: (1) hear Plaintiff’s due process claim; (2) conduct Administrative Procedures Act (APA”) review of ATF’s ruling; (3) declare 18 U.S.C. § 922(o) unconstitutional; or (4) issue the requested declaratory and injunctive relief. See Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) (No. 5). In response, Akins withdrew those claims. See Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) (No. 6).

Plaintiff filed the instant action on May 21, 2008, claiming that ATF/FTB’s actions were arbitrary and capricious and a violation of due process. (Dkt. 1.) Plaintiff seeks relief in the form of: (1) a declaration that the Akins Accelerator is not a machinegun; (2) an injunction prohibiting Defendant from treating the Akins Accelerator as a machinegun

for any purpose; (3) an alternative declaratory ruling that 26 U.S.C. § 5845(b) is unconstitutionally vague on its face and as applied to Plaintiff; (4) alternative injunctive relief prohibiting Defendant from applying 26 U.S.C. § 5845(b) so as to treat the Akins Accelerator as a machinegun; and (5) costs and attorney's fees. (Dkt. 1.)

On July 24, 2008, the Court of Federal Claims dismissed Akins' remaining claims, holding that Akins' takings claims were "barred under the police power doctrine," and further holding that Akins "voluntarily entered an area subject to pervasive federal regulation, in which he could not have an "expectation interest . . . protected by the Fifth Amendment. See Akins v. United States, 82 Fed. Cl. 619, 622-24 (Ct. Fed. Cl. 2008).

Standard of Review

This case is a challenge to ATF's interpretation of 26 U.S.C. § 5845 and its application to the Akins Accelerator. Such final agency actions may be challenged as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act ("APA"). See 5 U.S.C. § 706(2); 5 U.S.C. § 704. If that challenge is successful, the court may "hold [the action] unlawful and set aside agency action, findings, and conclusions." Sierra Club v. Flowers, 526 F.3d 1353, 1360 (11th Cir. 2008). "This standard of review is highly deferential, and presumes the validity of the agency action." Florida Manufactured Housing Ass'n, Inc. v. Cisneros, 53 F.3d 1565, 1572 (11th Cir. 1995); see also Sierra Club v. Van Antwerp, 526 F.3d 1353, 1360 (11th Cir. 2008) (holding that "this standard is exceedingly deferential").

It is well established that this Court should confine its review to the administrative record. See Garcia v. United States, 2002 U.S. Dist. LEXIS 22704, at *18 (S.D. Fla. May 8, 2002) (holding that “[i]n an APA case, judicial review is based on an administrative record provided by the defendant agency to the Court”); see generally Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985) (holding that “[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”). A complete administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege. In this case, Defendant has provided the Court with the complete administrative record and Plaintiff with a privilege log explaining the reasons for any redactions.

Ultimately, the reviewing court should only “ensure that the agency came to a rational conclusion, not [] conduct its own investigation and substitute its own judgment for the administrative agency’s decision.” Van Antwerp, 526 F.3d at 1360. Although the agency must have “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” the Court must “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Discussion

ATF concluded that the Akins Accelerator is a machinegun based on its testfiring of a retail-model Akins Accelerator, installed in a Ruger 10/22 rifle, in accordance with the manufacturer's instructions. Federal law defines a "machinegun" as any weapon which shoots "automatically more than one shot, without manual reloading, by a single function of the trigger." 28 U.S.C. § 5845(b). The definition includes "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." *Id.* (emphasis added). In the test-firing, FTB determined that "the person firing has to make one initial conscious effort to pull the trigger . . . [and] once the triggering cycle is initiated, the firearm continues to fire without interruption until a second, conscious releasing of the trigger stops the firing sequence." (R. 157). Thus, the Akins Accelerator fires "more than one shot, automatically, without manual reloading, and without any additional conscious action to manipulate the trigger," as set out in 28 U.S.C. § 5845(b).

Plaintiff does not dispute that the purpose of the Akins Accelerator is to make it possible for the shooter to act once and cause the rifle to fire repeatedly until its ammunition is exhausted or until the shooter takes an action to remove his finger from the device. (See Dkt. 25, Statement of Disputed Facts, ¶¶ 3-8.) In fact, Plaintiff acknowledged that the Akins Accelerator "bounces" the rifle back and forth, repeatedly causing the weapon to discharge by "push[ing] it into the finger." (*Id.* at ¶¶ 6-7.) As

Defendant asserts, the reasonableness of ATF's common-sense determination is supported by judicial precedent, legislative history, and the need to protect public safety.

The Supreme Court has adopted the view that "single function of the trigger" is synonymous with "single pull of the trigger." See Staples v. United States, 511 U.S. 600, 603 n.1 (1994). In Staples, the Supreme Court interpreted the NFA definition and concluded that "any fully automatic weapon is a 'firearm' within the meaning of the Act." Id. at 602. As the Court further explained, an automatic weapon is one "that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are 'machineguns' within the meaning of the Act." Id. at 603, n.1. In contrast, the Court "use[d] the term 'semiautomatic' to designate a weapon that fires only one shot with each pull of the trigger . . ." Id. Similarly, in analyzing a weapon that "required only one action-pulling [a user-installed] switch . . . to fire multiple shots," the Fifth Circuit concluded that a "single function of the trigger" should be interpreted as a single action -- the trigger pull. United States v. Camp, 343 F.3d 743, 745 (5th Cir. 2003).

The legislative history of the NFA also confirms that ATF, like the above-cited courts, reasonably reads the phrase "single function of the trigger" as encompassing any "single pull of the trigger." In testimony leading up to the passage of the NFA, the then president of the National Rifle Association equated the phrase "single function of the trigger" with a "single pull of the trigger." As he explained:

The distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition in the belt or in the magazine. Other guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns. A gun, however, which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun.

National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2nd Sess., at 40 (1934).

Furthermore, ATF possesses the authority “to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration.” Gun South Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989). At the same time, however, when “[a]n agency’s view of what is in the public interest” changes, it “must supply a reasoned analysis” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983). Without such a reasoned analysis, “[s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion.” Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996).

In this case, ATF presents such a “reasoned analysis,” demonstrating that its new interpretation of the phrase “single function of the trigger” is necessary to protect the public from dangerous firearms. In Ruling 2006-2, ATF explains that the motivation for its reconsideration of the earlier letters to Plaintiff came from requests by “several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm.” (Dkt. 12, Ex. I.) The Ruling then

sets forth a mechanical description of how such a device works (using the Akins Accelerator as an example) and reaches the important conclusion: “a single pull of the trigger initiates an automatic firing cycle.” (Id.) Next, it outlines the new policy, equating a “single function of the trigger” with a “single pull of the trigger,” and connecting the new interpretation to the legislative history of the NFA. (Id.) Finally, Ruling 2006-2 recognizes that this interpretation represents a policy change and states “to the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled.” Id.

Plaintiff claims to have had “legitimate reliance on [ATF’s] prior interpretation;” however, Plaintiff did make changes to the practical operation of the device and its marketing that contributed to ATF’s reconsideration, even if the “theory of operation” of the Akins Accelerator did not change after Plaintiff submitted his prototype . Plaintiff decided to retail a device intended for mounting on a different rifle model than that submitted for testing (the Ruger 10/22 instead of the SKS-type). In conjunction with requests that ATF review similar devices designed for other rifle models, this change highlighted the need for ATF to consider whether its interpretation of “single function of the trigger” remained appropriate. (See R. 159.) This factor certainly diminishes the weight of Plaintiff’s detrimental reliance argument. Notwithstanding, Plaintiff’s reliance interest cannot prevent agency reconsideration where the agency’s original opinion proves erroneous. See Belville Mining Co. v. United States, 999 F.2d 989, 999 (6th Cir. 1993).

The Court agrees with Defendant that in the face of technological innovation of the Akins Accelerator and similar devices, ATF's change of position is appropriate. ATF "must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 863-64 (1984). It is clear to this Court that ATF adopted its new position on the phrase "single function of the trigger" based on its experience and a reasoned analysis and because "[t]he court need only be satisfied that the bureau's policy change . . . [was] not the result of arbitrary and capricious action," ATF's new position is entitled to deference and "it is not [the] court's role[] to determine that the bureau's prior practice was the better position." Gilbert Equip. Co., Inc. v. Higgins, 709 F. Supp. 1071, 1078 (S.D. Ala. 1989) (upholding ATF's classification of a semiautomatic shotgun as "not particularly suitable for or readily adaptable to sporting purposes"); see also Springfield, Inc. v. Buckles, 292 F.3d 813, 819 (D.C. Cir. 2002) (finding that "agency views may change . . . [and] courts may require only a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

Although Plaintiff urges that Defendant's actions violate the Fifth Amendment's Due Process Clause, the APA does not require that ATF provide him with a formal hearing. In considering a procedural due process claim, the "Supreme Court's balancing test essentially requires [the Court] to weigh three factors: (1) the nature of the private interest; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in taking its action" Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335

(1976)). Because of the important interests in regulating Plaintiff's device and Plaintiff's actual presentation of his arguments in written form to the agency (see R. 123-R. 136), the Court is convinced after a balancing of interests that Plaintiff has not been deprived of due process. First, although Plaintiff identifies an important interest affected by the reclassification -- his ability to manufacture and sell the Akins Accelerator without registering under 26 U.S.C. § 5822 -- that interest is limited by the pervasive federal regulation of the manufacture and sale of firearms. See Akins v. United States, 82 Fed. Cl. 619, 624 (Ct. Fed. Cl. 2008). As the Court of Federal Claims noted, a business owner beginning manufacture of rapidly-repeating firearms "ought to be aware of the possibility that new regulation might even render his property economically worthless." Id. As Defendant asserts, Plaintiff's interest -- though important -- is lessened by the regulatory environment.

Given the second Eldridge factor, there is little risk of an erroneous deprivation of Plaintiff's interest in this case. The cornerstone of procedural due process is notice and a meaningful opportunity to be heard, and when those conditions are satisfied, there is "no absolute due process right to an oral hearing." See Forjan v. Leprino Foods, Inc., 209 Fed. Appx. 8 (2nd Cir. 2006); see also Raditch v. U.S., 929 F.2d 478, 480 (9th Cir. 1991) (holding that due process principles may be satisfied through "notice and an opportunity to respond," but response may be written or oral). After receiving notice of ATF's new position, Plaintiff presented a lengthy memorandum requesting that the agency reconsider its decision, a process for which he retained representation from two outside counsels.

(See Dkt. 12, Ex. J.) Plaintiff presented 14 pages of supporting legal arguments in his brief. (Id.) In his brief, Plaintiff included most of the legal arguments which he raises now supporting his position. It should also be pointed out that a new hearing before the agency is not the relief Plaintiff seeks for the agency's alleged violation of his procedural due process. Cf. Ray v. Foltz, 370 F.3d 1079, 1085 n.8 (11th Cir. 2004) (observing that the ordinary remedy for a denial of due process is "the grant of the procedures due"). Instead, he seeks a reversal of the agency's classification of the Akins Accelerator altogether. (Dkt. 1, ¶ 9.)

Plaintiff fails to even argue how an oral hearing would have made a difference in the outcome. Despite Plaintiff's urging to the contrary, his memorandum presented only questions of law and statutory interpretation, not factual disputes of the sort that require an oral hearing. See Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964) (stating that "[t]he opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved"). He is disputing the FTB's legal interpretations of what constitutes a "trigger function." He fails to identify any mistake of fact in the FTB's understanding of the operation of the Akins Accelerator. In a follow-up letter to the FTB, Plaintiff noted that he sought oral argument "because the public policy implications involved in this case will have long-term effects on the NFA community," not because he needed an opportunity to dispute the facts on which ATF based its decision. (R. 147.) However, inasmuch as Plaintiff had a meaningful chance to present his case to ATF in writing and there is little chance the

agency's decision proved erroneous, the second Eldridge factor supports ATF's determination.

While the Complaint describes Plaintiff's due process claim only as Defendant's alleged failure to provide him with a hearing, he asserts in his Response to Defendant's Motion that "Defendant was required to provide a notice of proposed rulemaking via publication in the Federal Register" before issuing ATF Ruling 2006-2. (Dkt. 25, 6.) However, "the APA's notice and comment requirements apply to substantive rules established through agency rulemaking, but do not apply to interpretive rules." Hi-Tech Pharms., Inc. v. Crawford, 505 F. Supp. 2d 1341, 1351 (N.D. Ga. 2007) (citing 5 U.S.C. § 553(b)). "Interpretive rules are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" Id. (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979)). As has been discussed, Ruling 2006-2 explains how ATF interprets the definition of "machinegun" contained in 26 U.S.C. § 5845(b) in the context of a device like the Akins Accelerator, and it is, therefore, an interpretive rule to which the APA's notice and comment requirements do not apply.

Finally, the third Eldridge factor weighs strongly in favor of ATF's action. The protection of the public's health and safety is a paramount government interest which justifies summary administrative action . . . [i]ndeed, deprivation of property to protect the public health and safety is 'one of the oldest examples' of permissible summary action." Gun South, 877 F.2d at 867 (quoting Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 300 (1981)). Weapons with a high rate of fire are

extremely desirable to criminals, increasing the government's interest in summary action to close off a loophole by which they could be acquired. See generally United States v. Kirk, 1997 U.S. App. LEXIS 12670, at *n.2 (5th Cir. 1997). As Plaintiff correctly observed in his briefing to the Court of Federal Claims, if the Akins Accelerator is not classified as a "machinegun," it would "not fall under any federal regulatory scheme of any kind." See Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) (No. 6). This unhindered capability would be wholly inconsistent with the strict regulation of machineguns imposed by the NFA and the prohibition on post-1986 machineguns imposed by the GCA. See United States v. Golding, 332 F.3d 838, 840 (5th Cir. 2003) (discussing the "risk . . . presented by the inherently dangerous nature of machineguns," as shown by "Congress's decision to regulate the possession and transfer of this specific type of firearm"); United States v. Haney, 264 F.3d 1161, 1168 (10th Cir. 2001) ("banning possession of post 1986 machine guns is an essential part of the federal scheme to regulate interstate commerce in dangerous weapons"). Thus, the Court agrees with Defendant that ATF has a powerful interest in correctly interpreting the statute to close the loophole created by its earlier interpretation of the machinegun definition and preserve the integrity of the system regulating dangerous weapons.

Finally, Plaintiff argues that the definition of machinegun found in 26 U.S.C. § 5845(b) "is unconstitutionally vague." (Dkt. 1, ¶ 43.) Although Plaintiff alleges that the statute is vague both "on its face" and "as applied to Plaintiff," Defendant is correct that this Court need only review the statute as-applied, because "[v]agueness challenges to

statutes not threatening First Amendment interests are examined in light of the facts of the case at hand.” United States v. Awan, 966 F.2d 1415, 1424 (11th Cir. 1992) (quoting Maynard v. Cartwright, 486 U.S. 356 (1988)). A statute is unconstitutionally vague “only where no standard of conduct is outlined at all; when no core of prohibited activity is defined.” Ford Motor Co. v. Texas Dep’t of Transp., 264 F.3d 493, 509 (5th Cir. 2001). On the other hand, a statute is not unconstitutionally vague unless it is “substantially incomprehensible,” and “men of common intelligence must necessarily guess at its meaning.” Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, 669 (11th Cir. 1984); United States v. Wilson, 175 Fed. Appx. 294, 297 (11th Cir. 2006).

Plaintiffs’ own allegations support the well-established precedent that 26 U.S.C. § 5845(b), although permitting multiple interpretations, does not fall within this realm of incomprehensibility. Plaintiff’s own actions in communicating repeatedly with ATF suggest that the statute gave him fair notice that Akins Accelerators might well fall within the prohibited standard of conduct. He sufficiently understood the section 5845(b) definition to submit the device to FTB for classification. (Dkt. 12, Exs. B, C.) When Plaintiff began to offer the device for sale, he used ATF’s original opinion as a marketing tool. (See, e.g., R. 196) (noting that “especially important was that the Accelerator™ had received not one, but two approval letters from BATFE through their Firearms Technical Branch”).) The fact that ATF’s initial classification was later deemed in error does not render the statute invalid for vagueness. Lawful statutes may be susceptible of multiple interpretations, and the mere fact that “there may be some ‘close cases’ or difficult

decisions does not render a policy unconstitutionally vague.” Hills v. Scottsdale Unified School Dist. No. 48, 329 F.3d 1044, 1056 (9th Cir. 2003); see also Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493, 509 (5th Cir. 2001) (holding that “[a] statute is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case”).

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Defendant’s Motion to Dismiss or in the Alternative Motion for Summary Judgment (Dkt. 19) is granted. The Clerk is directed to enter judgment for Defendant, terminate any pending motions, and close this case.

DONE AND ORDERED at Tampa, Florida, on September 23, 2008.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM AKINS,

Plaintiff,

VS.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 8:08-cv-988-T-26TGW

**REPLY IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS OR IN THE
ALTERNATIVE FOR SUMMARY JUDGMENT**

Plaintiff's Response in Opposition to Defendant's Motion fails to show that the decision by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") to classify the Akins Accelerator as a "machinegun" is arbitrary and capricious, unlawful, or violative of his constitutional rights. Accordingly, the Court should grant Defendant's Motion to Dismiss or in the Alternative for Summary Judgment. This brief reply will help clarify a few points raised in Plaintiff's Response and the accompanying "Statement of Disputed Facts," and thus aid the Court's decision. See Plaintiff's Response, dkt. no. 25 ("Response"); Statement of Disputed Facts; Ex. A to Response ("Statement").

I. Plaintiff's Statement of Disputed Facts Demonstrates That the Only Material Disputes Between the Parties are Legal, Not Factual.

This case is a challenge to final agency action, namely, ATF's interpretation of 26 U.S.C. § 5845 and its application to the Akins Accelerator. As such, as Defendant has consistently

argued, the Court should decide it based on the administrative record, without any need to consider extrinsic facts or to permit discovery. See Defendant's Motion at 9, n.3, dkt. no. 19 ("Defendant's Motion"); Case Management Report at 1, dkt. no. 17 (July 25, 2008). Because the facts set forth in Plaintiff's "Statement of Disputed Facts" are not material to the Court's narrow review of the agency's action, the Court may resolve this matter on the basis of the existing record.¹ See Defendant's Motion at 8; Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers; 87 F.3d 1242, 1246-47 (11th Cir. 1996) (appropriate to grant summary judgment based on the administrative record).

Indeed, Plaintiff's Statement of Disputed Facts itself confirms that Plaintiff's challenge is to ATF's interpretation. For instance, Plaintiff does not dispute that the purpose of the Akins Accelerator is to make it possible for the shooter to act once and cause the rifle to fire repeatedly until its ammunition is exhausted or until the shooter takes an action to remove his finger from the device. See Statement at ¶¶ 3-8. Notwithstanding Plaintiff's claim that Defendant has ignored the meaning of the word "automatically," Response at 13, Plaintiff acknowledges that the Akins Accelerator "bounces" the rifle back and forth, repeatedly causing the weapon to discharge by "push[ing] it into the finger." Id. at ¶¶ 6-7. Plaintiff's description makes clear that the Akins Accelerator causes a weapon to fire repeatedly, without further action by the shooter,

¹ Importantly, Plaintiff erroneously claims that the redactions and omissions in the administrative record are "unexplained" or "without explanation." Plaintiff has been furnished with a privilege log explaining the reasons for these redactions, which are entirely appropriate where statutory requirements or legal privileges limit the agency's obligation to disclose certain information. See, e.g., Tafas v. Dudas, 530 F.Supp.2d 786, 794 (E.D.Va. 2008) ("A complete administrative record, however, does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege.").

which is the factual basis for ATF's decision. See Defendant's Motion at 9, 12-13, 15. Thus, the dispute between the parties is not over the facts set forth in ¶¶ 3-8 of Plaintiff's statement, but over whether ATF has reasonably interpreted the meaning of a "single function of the trigger" to include these facts.²

The subsequent facts set forth by Plaintiff agree with those stated in the pleadings and the administrative record. The Complaint noted the reliance by both Mr. Akins and his customers on ATF's original position on the meaning of "single function of the trigger." See Compl., Ex. J, at 6; compare Statement at ¶¶ 9, 13. Plaintiff's description of the communications with ATF similarly confirms the account set forth in the Complaint. See id. at ¶¶ 9-12, 15-18. Likewise, the parties agree that the sample Akins Accelerator provided in 2003 "was made for an SKS-type semiautomatic rifle," on the contents of the memo by Richard Vasquez contained in the administrative record, and that, pursuant to ATF's decisions, the spring must be removed from Akins Accelerators. See id. at ¶ 11, n.8, ¶ 20, ¶ 19. Thus, Plaintiff's Statement of Disputed Facts presents no obstacle to resolution of this case on the basis of the pleadings and the administrative record.

² To the extent Defendant does not agree with Plaintiff's statement of these facts, or has no information about certain facts, those facts are not material to the question of whether ATF acted reasonably. For example, ATF has never attempted the procedure described in ¶¶ 3-4, but has no reason to say that Plaintiff's statement is wrong. Nor is it relevant that Defendant does not agree that is "has deemed [the spring] to be a machine gun," an erroneous inference that Plaintiff apparently arrives at from ATF's requirement that Akins Accelerators be rendered inoperative by removing those springs. See ¶ 5, n.4; ¶ 19. Similarly, while ATF cannot confirm Plaintiff's statements about the market's "response to the product," there is no indication that this fact has any bearing on the issues in this case. Id. at ¶ 14.

II. Because ATF Ruling 2006-2 Provides an Interpretive Rule, Notice and Comment is Not Required by the APA.

The Complaint describes Plaintiff's due process claim only as Defendant's alleged failure to provide him with "a hearing." Citing 5 U.S.C. § 553(b), Plaintiff now asserts that "Defendant was required to provide a notice of proposed rule making via publication in the Federal Register" before issuing ATF Ruling 2006-2. Response at 6. Plaintiff misunderstands the scope of the APA's notice-and-comment requirement. Because Ruling 2006-2 is an interpretative rule, not a substantive rule, the requirements of § 553(b) do not apply.

"The APA's notice and comment requirements apply to substantive rules established through agency rulemaking, but do not apply to interpretive rules." Hi-Tech Pharms., Inc. v. Crawford, 505 F. Supp. 2d 1341, 1351 (N.D. Ga. 2007) (citing 5 U.S.C. 553(b)). "Substantive rules are those that implement statutes and have the force and effect of law." Id. In contrast, "[i]nterpretive rules are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" Id. (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979)). Ruling 2006-2 spells out how ATF is interpreting the definition of machinegun contained in 26 U.S.C. § 5845(b) in the context of a device like the Akins Accelerator, and is therefore an interpretive rule to which the APA's notice and comment requirements do not apply.

Under similar circumstances in York v. Secretary of Treasury, the 10th Circuit recognized that an ATF ruling on whether to classify a device as a machinegun is an "administrative interpretation of an existing statute," based on its discussion of how to define the terms in the statute. 774 F.2d 417, 419-20 (10th Cir. 1985). Noting that the ruling contained "elements of both adjudication and rulemaking," the Court concluded that to the extent the ruling was a

rulemaking, it was “merely an interpretative rule not subject to either notice and comment procedure under 5 U.S.C. § 553 or the formalities of an agency hearing under 5 U.S.C. §§ 556-557.” Id. at 420.

As Defendant noted in its opening brief, the York Court did state that “due process would require a hearing . . . after the issuance of the [classification] order,” because the agency’s classification decision also acts as an adjudication. Defendant’s Motion at 21, n. 11 (“MTD”); York, 774 F.2d at 420.³ However, that Court found that such a hearing would only be necessary “if [Plaintiff] contends the agency made a mistake of fact.” Id. As in York, Mr. Akins’s claim is subject to resolution as a matter of law, not as a matter of fact: he is disputing the agency’s legal interpretation of what constitutes a “trigger function.” Notwithstanding his bare assertion that “Defendant’s decision was factually wrong,” see Response at 8, Plaintiff is not entitled to a hearing as a matter of due process because he has not identified any “mistake of fact” in ATF’s understanding of the operation of the Akins Accelerator that such a hearing could rectify. The limited nature of his challenge is underscored by the relief he seeks: not a hearing, but a reversal of the agency’s classification of the Akins Accelerator altogether. See Complaint at 9.

CONCLUSION

For the reasons set forth herein and in Defendant’s Motion, ATF acted reasonably in protecting the public from rapid-firing rifles by classifying Plaintiff’s invention as a machinegun. Accordingly, the Court should dismiss Plaintiff’s claims and grant judgment in favor of Defendant.

³ Significantly, just as Defendant has proposed in this case, the York Court reached this conclusion after applying the standards set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), to conclude that due process did not require a pre-deprivation hearing.

Dated: September 18, 2008

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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

WILLIAM AKINS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 8:08-cv-988-T-26TGW

**DEFENDANT’S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 12(b)(6), defendant moves to dismiss plaintiff’s Complaint for failure to state a claim for which relief may be granted. In the alternative, defendant is entitled to summary judgment on plaintiff’s claims. A memorandum of points and authorities in support of this motion is appended hereto and incorporated by reference.

Dated: August 22, 2008

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BACKGROUND

Under the Gun Control Act (“GCA”), Congress has prohibited any person from “possess[ing] a machinegun” manufactured after May 19, 1986, subject to a limited exception for law enforcement agencies. 18 U.S.C. § 922(o). In banning machineguns, Congress drew upon the definition of “machinegun” in the National Firearms Act (“NFA”), Internal Revenue Code of 1954, 26 U.S.C. § 5845, which defines a machinegun as:

any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled, if such parts are in the possession or under the control of a person.

See 18 U.S.C. § 921(a)(23); § 922(b); 26 U.S.C. § 5845; see also 27 C.F.R. 478.11; 479.11.

Manufacturers of machineguns are required to register in accordance with 26 U.S.C. § 5822 and may only manufacture them for the use of a Federal or state department or agency. See 18 U.S.C. § 922(o). Congress has delegated the authority to regulate under the NFA to the ATF. See 27 C.F.R. § 479; U.S. v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725, 416 F.3d 977 (9th Cir. 2005) (recognizing delegation of authority to ATF).

In 1998, Plaintiff developed what he described as an “apparatus for accelerating the cyclic firing rate of a semi-automatic firearm,” and applied for a patent from the United States Patent and Trademark Office. (Exhibit A). On or about August 15, 2000, Plaintiff received Patent No. 6,101,918 for his device, which he subsequently dubbed the “Akins Accelerator.” (Compl. at Ex. B; Compl. at ¶ 7).

Apparently concerned that possession of an Akins Accelerator (plainly manufactured

after May 19, 1986) would violate the Gun Control Act, Plaintiff wrote to the Firearms Technology Branch (“FTB”) of ATF on March 31, 2002, and asked whether the device would be classified as a machinegun, enclosing a copy of his patent abstract. (Compl. at Ex. B; Compl. at ¶ 9). On July 28, 2003, the Chief of the FTB asked that Plaintiff submit a sample of the device. In return, on August 21, 2003, Thomas Bowers, a business associate of Plaintiff, submitted a prototype to FTB. (Complaint at ¶ 15).

FTB examined the Akins Accelerator prototype, installed it in an SKS-type rifle, and test-fired it. (Compl. at Ex. E). On the second test firing, the prototype broke. Id. Nevertheless, FTB determined that “the submitted stock assembly does not constitute a machinegun . . . [nor] a part or parts designed and intended for use in converting a weapon into a machinegun.” Id. FTB informed Mr. Bowers of its conclusion in a November 17, 2003 letter, noting that the “weapon did not fire more than one shot by a single function of the trigger.” Id.

Mr. Bowers then submitted a followup letter on January 21, 2004. In that letter, Mr. Bowers expressed “confusion” over the meaning of the November 17, 2003 letter, and asked FTB to “clearly state[]” its opinion on the “application of the principle of operation” of the Akins Accelerator, not just on the physical prototype itself. (Compl. at Ex. F).

FTB replied to Mr. Bowers’ letter on January 29, 2004. This letter described “the proposed theory of operation” as “the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire.” (Compl. at Ex. G). The January 29, 2004 letter then stated that the “classification of the stock assembly was rendered despite” the breakage of the prototype, noting that “[t]he theory of operation was clear even though the rifle/stock assembly did not perform as intended.” Id. The letter emphasized, however, that its conclusions

were “valid provided that when the stock is assembled with an otherwise unmodified SKS semiautomatic rifle, the rifle does not discharge more than one shot by a single function of the trigger.” Id.

On August 18, 2006, the website selling the Akins Accelerator came to the attention of ATF. (R. 25).¹ The website advertised the device as “Evaluated by FTB/USDOJ/BATFE” and quoted from FTB’s letters and the National Firearms Act. Id. at 25-26. Shortly thereafter, an Akins Accelerator customer wrote FTB and requested “a written determination” of whether the device, “assembled with a standard Ruger 10/22 semiautomatic carbine as described by the manufacturer,” would constitute a firearm within the NFA.² The letter writer expressed his concerns that the earlier letters to Mr. Bowers did not “specifically include the use of the device with a standard Ruger 10/22 semiautomatic carbine. Id. at 27-28. Around the same time, FTB received requests to evaluate other devices to accelerate the rate of fire of a semiautomatic firearm, including one to be used in conjunction with an AK-47 type semiautomatic rifle. (R. 50-52).

Accordingly, ATF opened an investigation into the now on-sale Akins Accelerator on September 22, 2006. R. 54. ATF obtained a retail-model device on October 6, 2006, and forwarded it to FTB on October 11, 2006. Id. Following a test-firing of the retail-model device, on November 22, 2006, FTB wrote a new letter to Mr. Bowers, advising him that FTB had tested the retail-model device with a Ruger 10/22 rifle and “demonstrated that a single pull of the

¹ This brief employs the format “R.” for citations to the administrative record, attached as Exhibits A through G.

² See 26 U.S.C. § 5845(a) (defining “firearm”).

trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.” (Compl. at Ex. H). The letter also noted that “[t]he Akins device assembled with a Ruger 10/22 is advertised to fire approximately 650 rounds per minute,” and concluded that the device must be classified as a machinegun. Id.

Concerned about the public safety implications of other, similar devices, ATF also issued a new policy statement - ATF Ruling 2006-2 - on December 13, 2006. (Compl. at Ex. I). In that statement, ATF explained that “conversion parts that, when installed in a semiautomatic rifle, result in a weapon that shoots more than one shot, without manual reloading, by a single pull of the trigger, are a machinegun as defined in the National Firearms Act and the Gun Control Act.” Id. In addition, ATF provided a description of the Akins Accelerator, and held that such a device would be a machinegun.

On February 6, 2007, Plaintiff, acting through counsel, requested that ATF reconsider its classification of the Akins Accelerator as a machinegun. (Compl. at Ex. J). The request for reconsideration asserted that... “[i]f . . . the trigger finger remains in contact with the trigger, only one shot can result until the trigger is released and then pressed again.” It also observed that a number of other devices have not been classified as machineguns, including devices that fire two or three shots with a single pull of the trigger. Id.; R. 132. Ultimately, the request for reconsideration emphasized that the agency’s original classification of the Akins Accelerator was “consistent” with “long-standing agency interpretations.” Id.; R. 135. In conjunction with his request that ATF reconsider Ruling 2006-2, Plaintiff requested the opportunity “to present [his] case orally” to ATF. (R. 147). ATF did not agree to an oral presentation, and ultimately upheld the machine gun classification without a hearing. (Compl. at Ex. K).

On March 6, 2008, Akins filed a lawsuit in the Court of Federal Claims, requesting compensation under the Takings Clause of the Fifth Amendment, as well as declaratory and injunctive relief reversing ATF's classification of the Akins Accelerator. Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008). On May 2, 2008, the United States moved to dismiss the case, arguing with respect to Akins' declaratory and injunctive relief claims that the Court of Federal Claims "lack[ed] jurisdiction to (1) hear Plaintiff's due process claim, (2) conduct Administrative Procedures Act ("APA") review of ATF's ruling, (3) declare 18 U.S.C. § 922(o) unconstitutional, or (4) issue the requested declaratory and injunctive relief." Opinion and Order at 3, Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) ("Akins I"). In response, Akins withdrew those claims and on May 21, 2008, filed this action to reassert them. Id.; Compl., dkt. no. 1. On July 24, 2008, the Court of Federal Claims dismissed Akins' remaining claims, holding that Akins' takings claims were "barred under the police power doctrine," and further holding that Akins "voluntarily entered an area subject to pervasive federal regulation," in which he could not have an "expectation interest . . . protected by the Fifth Amendment." Akins I at 6-7.

ARGUMENT

I. Legal Framework

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court should construe the allegations of the complaint favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The complaint should be dismissed "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Mesocap Ind. Ltd. v. Torm Lines, 194 F.3d 1342, 1343 (11th Cir. 1999) (quoting Hishon v. King & Spalding, 467 U.S. 69,

73 (1984)). While courts must accept all precisely worded factual allegations as true, legal conclusions or unsupported inferences or assumptions contained in a complaint need not be accepted in the context of deciding a Rule 12 motion. see Gonzalez v. Reno, 325 F.3d 1228, 1235 (11th Cir. 2003); Oxford Asset Management, Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002) ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal").

If the Court looks to matters outside the pleadings submitted in support of a motion to dismiss, the motion is converted to one for summary judgment pursuant to Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(d). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Jeffery v. Sarasota White Sox, 64 F.3d 590, 593-94 (11th Cir. 1995); Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989).

The summary judgment procedure "is particularly appropriate in cases in which the court is asked to review . . . the decision of a federal administrative agency." Florida Fruit & Vegetable

Growers Ass'n v. Brock, 771 F.2d 1455, 1459 (11th Cir. 1983) (internal citations omitted). In this case, “application of the arbitrary and capricious standard to the [agency’s] conclusions in view of the facts in the administrative record raises legal questions, not factual ones.” Miccosukee Tribe of Indians v. United States, 420 F. Supp. 2d 1324, 1332 (S.D. Fla. 2006).

II. ATF Properly Classified the Akins Accelerator as a Machinegun.

A. The Court Should Give Substantial Deference to ATF’s Classification Decision.

Final agency actions such as ATF’s classification of the Akins Accelerator as a machinegun may be challenged as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under the Administrative Procedure Act (“APA”). See 5 U.S.C. § 706(2); 5 U.S.C. § 704. If the reviewing court finds that the agency’s action is arbitrary or capricious, the court may “hold [the action] unlawful and set aside agency action, findings, and conclusions.” Sierra Club v. Flowers, 526 F.3d 1353, 1360 (11th Cir. 2008). “This standard of review is highly deferential, and presumes the validity of the agency action.” Florida Manufactured Housing Ass’n, Inc. v. Cisneros, 53 F.3d 1565, 1572 (11th Cir. 1995); see also Sierra Club v. Antwerp, 526 F.3d 1353, 1360 (11th Cir. 2008) (“this standard is exceedingly deferential.”). The reviewing Court should only “ensure that the agency came to a rational conclusion, not [] conduct its own investigation and substitute its own judgment for the administrative agency’s decision.” Van Antwerp, 526 F.3d at 1360. Although the agency must have “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” the Court must “uphold a decision of less than ideal clarity if the agency’s path may reasonably be

discerned.” Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).³

B. ATF's Decision to Classify the Akins Accelerator as a machine gun is reasonable.

ATF reasonably concluded that the Akins Accelerator is a machinegun based on its test-firing of a retail-model Akins Accelerator, installed in a Ruger 10/22 rifle in accordance with the manufacturer's instructions. A machinegun is defined as any weapon which shoots “automatically more than one shot, without manual reloading, by a single function of the trigger.” 26 U.S.C. § 5845(b). The definition includes “any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun.” Id.⁴ In the test-firing, FTB determined that “the person firing has to make one initial conscious effort to pull the trigger . . . [and] once the triggering cycle is initiated, the firearm continues to fire without interruption until a second, conscious releasing of the trigger stops the firing sequence.” (R. 157). Thus, the Akins Accelerator fires more than one shot, automatically, without manual reloading, and without any additional conscious action to

³ Because this case challenges final agency action under the APA, it is well established that this Court should confine its review to the administrative record. See Garcia v. United States, 2002 U.S. Dist. LEXIS 22704 at *18 (S.D. Fla. May 8, 2002 (“In an APA case, judicial review is based on an administrative record provided by the defendant agency to the Court”)); Coastal Conservation Ass'n v. Gutierrez, Nos. 2:05CV400, 2:05CV419, 2005 WL 2850325, at *4 (M.D. Fla. Oct. 31, 2005) (“[t]he Court's review is limited to the administrative record”); see generally Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (“The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

⁴ There is no dispute that ATF classified the Akins Accelerator as a machinegun pursuant to the latter portion of the statutory definition.

manipulate the trigger. The reasonableness of ATF's common-sense determination is supported by judicial precedent, legislative history, the text of the statute, and the need to protect public safety.

Although the National Firearms Act does not further explain the phrase "single function of the trigger," the Supreme Court has adopted the view that "single function of the trigger" is synonymous with "single pull of the trigger." See Staples v. United States, 511 U.S. 600, 603 n.1 (1994). In Staples, the Court interpreted the National Firearms Act definition and concluded that "any fully automatic weapon is a 'firearm' within the meaning of the Act." Id. at 602. As the Court further explained, an automatic weapon is one "that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are 'machineguns' within the meaning of the Act." Id. at 603, n.1. In contrast, the Court "use[d] the term 'semiautomatic' to designate a weapon that fires only one shot with each pull of the trigger" Id.

Similarly, in analyzing a weapon that "required only one action-pulling [a user-installed] switch . . . to fire multiple shots," the Fifth Circuit concluded that a "single function of the trigger" should be interpreted as a single action – the trigger pull. United States v. Camp, 343 F.3d 743 (5th Cir. 2003). Courts in the Seventh and Tenth Circuits have followed a similar approach. See United States v. Fleischli, 305 F.3d 643, 655-56 (7th Cir. 2002) (superseded by statute on other grounds) (an "electronic switch served to initiate the firing sequence [causing] the minigun . . . to fire until the switch was turned off or the ammunition was exhausted. The minigun was therefore a machine gun as defined in the National Firearms Act."); United States v.

Oakes, 564 F.2d 384, 388 (10th Cir. 1977). By concluding that a “single pull” of the trigger constitutes a “single function,” ATF has therefore chosen a position widely consistent with judicial authority.

In his submission to ATF, Plaintiff observed that an ATF agent testified in Camp that “the ATF understands [] trigger activators to be legal,” and asserted that the Akins Accelerator is a similar type of trigger activator. Compl. at Ex. J. at 12. However, the expert explained that the difference is because a shooter using a trigger activator still had to separately pull the trigger each time to fire the gun. Id. Because the Akins Accelerator does not require separate conscious pulls of the trigger, the agent’s analysis in Camp is not relevant to ATF’s classification of the Akins Accelerator as a machinegun.

The legislative history of the NFA confirms that ATF, like the above-cited courts, reasonably reads the phrase “single function of the trigger” as encompassing any “single pull of the trigger.” In testimony leading up to the passage of the National Firearms Act, the then-president of the National Rifle Association equated the phrase “single function of the trigger” with a “single pull of the trigger.” As he explained:

The distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition in the belt or in the magazine. Other guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns. A gun, however, which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun.

National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2nd Sess., at 40 (1934).

Likewise, the ordinary meaning of the term “function” supports ATF’s interpretation. In common usage, a “function” includes “any of a group of related actions contributing to a larger

action.” Webster’s Ninth New Collegiate Dictionary, 498 (1986); see also Random House Thesaurus College Edition, 297 (1984) (a synonym of function is “act”). The relevant act or action may be a pull of the trigger; it may be a push of the trigger, or it may be a single event initiating an automatic firing sequence.⁵ Here the act is the most basic of weapons-firing techniques: the pull of the trigger, which initiates a continuous sequence of firing that continues until the conscious release of the trigger.⁶ Consequently, Plaintiff is incorrect that the meaning of “function” is so narrow as to require that each vibration of the Akins-equipped trigger against a shooter’s finger be defined as a separate function.

Finally, ATF’s classification decision is consistent with the purpose of the National Firearms Act. Among the federal firearms statutes, the NFA focuses on regulating “especially dangerous weapons such as machine guns and silencers.” RSM v. Herbert, 466 F.3d 316, 318 (4th Cir. 2006). The inclusion of machineguns in the NFA’s prohibition stems from Congress’s “specific declaration and finding that destructive devices (such as bazookas, mortars, antitank guns, bombs, missiles, etc.,) machine guns, short-barreled shotguns, and short-barreled rifles are

⁵ Although a pull of the trigger is the most common firing action, several types of machineguns in existence at the enactment of the NFA “fired by pushing the trigger.” (R. 159) (citing the Buffalo Arms, .30 caliber M2, M2 Browning .50 caliber, Maxim, and Vickers machineguns). Other, modern machineguns function through electrical switches. Id. (citing the helicopter-mounted minigun).

⁶ That an Akins Accelerator-equipped rifle fits the definition of a machine gun as generally understood by firearms users is also true – indeed, it is a key part of the appeal of the Akins Accelerator. See R. 232 (Small Arms Review article) (the device sounds “too good to be true [as] a legal and inexpensive alternative to transferable machine guns”); see also George C. Nonte, Jr., Firearms Encyclopedia 13 (1973) (the term “automatic” is defined to include “any firearm in which a single pull and continuous pressure upon the trigger (or other firing device) will produce rapid discharge of successive shots so long as ammunition remains in the magazine or feed device – in other words, a machinegun”). Of singular importance, however, is that the Akins Accelerator fits the statutory definition of a machinegun as well.

primarily weapons of war and have no appropriate sporting use or use for personal protection.” United States v. Jennings, 195 F.3d 795, 799 n.4 (5th Cir. 1999) (quoting S. REP. No. 90-1501, at 28 (1968)); see also United States v. Dunlap, 209 F.3d 472, 478 n.12 (6th Cir. 2000) (“Congress required registration of these types of weapons because it believed that these weapons, by their very nature, were extremely dangerous and served virtually no purpose other than furtherance of illegal activity.”); United States v. Kirk, 1997 U.S. App. LEXIS 12670 at * 19 (5th Cir. 1997) (“machine guns are very different weapons from guns without the capability of automatic fire and have been the subject of federal commerce regulation for nearly sixty years.”). The Ruger 10/22 rifle, modified with a retail-model Akins Accelerator, is precisely this type of “extremely dangerous” weapon. With its “continuous fire” at a rate of 650 rounds per minute, it has the “firepower of a machine gun,” which “puts it in a quite different category from [] handguns, shotguns, and rifles.” Kirk, 1997 U.S. App. LEXIS 12670 at * 17.⁷

C. ATF’s Earlier, Contrary Position Does Not Affect the Reasonableness of Its Classification.

Although ATF changed its position on the proper classification of the Akins Accelerator, its new position is nonetheless entitled to significant deference. Like other agencies, ATF possesses the authority “to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration.” Gun South Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989). The Eleventh Circuit has recognized that ATF possesses such authority, noting that an “agency, like a court, can undo what is wrongfully done by virtue of its

⁷ Although the Akins Group advertised the Akins Accelerator as delivering performance of 650 rounds per minute, the Small Arms Review magazine suggested it could achieve a rate of fire as high as 800 rounds per minute. See R. 232.

order.” Id. (quoting United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 229 (1965)). And the Supreme Court has “rejected the argument that an agency’s interpretation ‘is not entitled to deference because it represents a sharp break with prior interpretations’ of the statute in question.” Rust v. Sullivan, 500 U.S. 173, 186 (1991) (quoting Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 862 (1984)).

At the same time, however, when “[a]n agency’s view of what is in the public interest” changes, it “must supply a reasoned analysis”). Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983). Without such a reasoned analysis, “[s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion.” Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (where there is a “long pattern of erratic treatment” of an issue, an agency’s view is “entitled to considerably less deference than a consistently held agency view”). Here, ATF has presented a “reasoned analysis,” demonstrating that its new interpretation of the phrase “single function of the trigger” is necessary to protect the public from dangerous firearms.

ATF set forth its original position on the meaning of “single function of the trigger” in a September 28, 1989 memorandum. See R. 158-59. At the time, ATF applied its analysis to a “semi-automatic rifle which has a ‘two stage trigger.’” This device “would fire one round of ammunition when the trigger is pulled and also one round when it is released.” (R. 158). The memorandum notes that the agency had considered other firearms with a “two-stage” trigger design, and “interpret[ed] the phrase “single function of the trigger” to mean a single “movement of the trigger, whether that movement is the pull of the trigger or the release of the trigger.” Id. at

159. Because of the limited operation of the two-stage trigger, ATF did not consider whether types of movements other than a “pull” or a “release” should be treated differently.

In Ruling 2006-2, ATF revisited the issue, with precisely the sort of “reasoned analysis” required for a reversal. The ruling explains the motivation for the agency’s reconsideration: requests from “several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm.” (Compl. at Ex. I). Ruling 2006-2 then sets forth a mechanical description of how such a device works (using the Akins Accelerator as an example) and reaches the important conclusion: “a single pull of the trigger initiates an automatic firing cycle.” Next, Ruling 2006-2 outlines the new policy, equating a “single function of the trigger” with a “single pull of the trigger,” and connecting the new interpretation to the legislative history of the NFA. Finally, Ruling 2006-2 recognizes that this interpretation represents a policy change and states “to the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled.”⁸ Id.

Plaintiff claims to have had “legitimate reliance on [ATF’s] prior interpretation.” Smiley, 517 U.S. at 742. Nevertheless, although the “theory of operation” of the Akins Accelerator did not change after Plaintiff submitted his prototype, Plaintiff did make changes to the practical operation of the device and its marketing that contributed to ATF’s reconsideration. Plaintiff decided to retail a device intended for mounting on a different rifle model than that submitted for testing (the Ruger 10/22 instead of the SKS-type, see infra at 3-4). In conjunction with requests

⁸ Although it has taken a new position, ATF is not required to upset its resource allocation to revisit every prior classification conducted under the old interpretation. In any case, it is far from certain that any device other than the Akins Accelerator that was previously ruled “not a machinegun” would now fall within the definition. See R. 158-59 (discussing the “two-stage trigger” which fires multiple rounds of ammunition only with a pull and subsequent release of the trigger. In contrast, the Akins Accelerator fires multiple rounds with a single trigger pull).

that ATF review similar devices designed for other rifle models, this change highlighted the need for ATF to consider whether its interpretation of “single function of the trigger” remained appropriate. See R. 159. Further, in marketing the device, Plaintiff noted the potential for the extraordinary rate-of-fire as high as 650 rounds per minute, which demonstrated its actual dangerousness in a fashion that the theoretical operation and the testing of the prototype could not. These factors diminish the weight of Plaintiff’s reliance interest, which in any case cannot prevent agency reconsideration where the agency’s original opinion proves erroneous. See Belville Mining Co. v. United States, 999 F.2d 989, 999 (6th Cir. 1993).

In the face of technological innovation, the agency’s change of position is appropriate; indeed, the agency “must consider varying interpretations and the wisdom of its policy on a continuing basis.” Chevron, 467 U.S. at 863-64. The agency adopted its new position on the phrase “single function of the trigger” based on its experience and a reasoned analysis. Because “[t]he court need only be satisfied that the bureau’s policy change . . . [was] not the result of arbitrary and capricious action,” the agency’s new position is entitled to deference and “it is not [the] court’s role[] to determine that the bureau’s prior practice was the better position.” Gilbert Equipment Co., Inc. v. Higgins, 709 F.Supp. 1071, 1078 (S.D. Ala. 1989) (upholding ATF’s classification of a semiautomatic shotgun as “not particularly suitable for or readily adaptable to sporting purposes.”); see also Springfield, Inc. v. Buckles, 292 F.3d 813, 819 (D.C. Cir. 2002) (“agency views may change . . . [and] courts may require only a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”).

III. Plaintiff's Due Process Claim Should be Dismissed.

The APA does not require that Plaintiff receive a formal hearing. Plaintiff therefore advances an erroneous claim that he is entitled to a hearing under the Fifth Amendment due process clause. “Rather than setting categories of mandatory procedural protections in all cases,” however, courts determine “the nature and timing of the requisite process in an individual case by accommodating the relevant competing interests.” Gun South at 867 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 434, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982)). In considering a procedural due process claim, the “Supreme Court's balancing test essentially requires [the Court] to weigh three factors: (1) the nature of the private interest; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in taking its action” Id. (citing Mathews v. Eldridge). In keeping with this flexible examination, “the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances.” Greene v. WCI Holdings Corp., 136 F.3d 313, 316 (2nd Cir. 1998). Because of the important interests in regulating Plaintiff's device and Plaintiff's actual presentation of his arguments in written form to the agency, R.123-R.136, the balancing of the interests demonstrate that Plaintiff has not been deprived of due process.

First, although Plaintiff identifies an important interest affected by the reclassification – his ability to manufacture and sell the Akins Accelerator without registering under 26 U.S.C. § 5822 – that interest is limited by the “pervasive federal regulation [of] the manufacture and sale of firearms.” Akins I at 6.⁹ As the Court of Federal Claims noted, a business owner beginning the

⁹ Although the “pervasive” nature of the federal regulation eliminates Plaintiff's interest for Takings Clause purposes, see id., Defendant does not take the position that it has an identical effect for due process purposes. However, Plaintiff's reasonable expectations about the stability of a business in the firearms industry are necessarily limited by the extent of existing government

manufacture of rapidly-repeating firearms “ought to be aware of the possibility that new regulation might even render his property economically worthless.” Id. Regardless of ATF’s answer to Plaintiff’s pre-production letters, Plaintiff should have been aware that a new statute or new regulations could instantaneously transform his operating environment. Plaintiff’s interest – though important – is thus lessened by the regulatory environment.

At the same time, under the second Eldridge factor, there is little risk of an erroneous deprivation of Plaintiff’s interest in this case. The cornerstone of procedural due process is notice and a meaningful opportunity to be heard, and when those conditions are satisfied, there is “no absolute due process right to an oral hearing.” See Forjan v. Leprino Foods, Inc., 209 Fed.Appx. 8 (2nd Cir. 2006); see also Raditch v. U.S., 929 F.2d 478, 480 (9th Cir. 1991) (Due process principles may be satisfied through “notice and an opportunity to respond,” but response may be written or oral.). After receiving notice of the agency’s new position, Plaintiff presented a lengthy memorandum requesting that the agency reconsider its decision, a process for which he retained representation from two outside counsels. See Compl. at Ex. J. (Plaintiff’s memorandum requesting reconsideration, identifying Steve Halbrook of Fairfax, VA and Mark Barnes of Washington, DC as plaintiff’s counsel). Plaintiff presented 14 pages of supporting legal arguments in his brief. Id. On the subject of the agency’s decision, Plaintiff included then most of the legal arguments which he raises now supporting his position. Together, these constitute the meaningful opportunity to be heard to which Plaintiff is entitled.

regulation.

Nor has Plaintiff presented a suggestion that an oral hearing would have made a difference in the outcome.¹⁰ Plaintiff's memorandum presented only questions of law and statutory interpretation, not factual disputes of the sort that require an oral hearing. See Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964) ("[t]he opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved."). Moreover, the agency's determination, driven by the well-documented design of the device, has a low risk of error, because it is "easily documented and not based to a significant extent upon witness credibility or other subjective determinations." See York v. Secretary of Treasury, 774 F.3d 417, 421 (10th Cir. 1985). Indeed, in a follow-up letter, Plaintiff noted that he sought oral argument "because the public policy implications involved in this case will have long-term effects on the NFA community," not because he needed an opportunity to dispute the facts on which ATF based its decision. (R. 147). As Plaintiff had a meaningful chance to present his case to ATF in writing and there is little chance the agency's decision proved erroneous, the second Eldridge factor supports ATF's determination.

Finally, the third Eldridge factor weighs strongly in favor of the government's action. "The protection of the public's health and safety is a paramount government interest which justifies summary administrative action . . . [i]ndeed, deprivation of property to protect the public health and safety is 'one of the oldest examples' of permissible summary action." Gun South at

¹⁰ Significantly, a new hearing before the agency is not the relief Plaintiff seeks for the agency's alleged violation of his procedural due process. Compare Ray v. Foltz, 370 F.3d 1079, 1085 n.8 (11th Cir. 2004) (observing that the ordinary remedy for a denial of due process is "the grant of the procedures due."). Instead, Plaintiff wants this Court to find that his device is cleverly designed to escape regulation under the system of laws that protect the public from extremely dangerous, high-firepower weapons. Where Plaintiff's cleverness and the public safety collide, however, the public interest should prevail.

867 (quoting Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 300 (1981)). Weapons with a high rate of fire are extremely desirable to criminals, increasing the government's interest in summary action to close off a loophole by which they could be acquired. See generally United States v. Kirk, 1997 U.S. App. LEXIS 12670 at n.2 (5th Cir. 1997) (collecting cases in which criminals sought automatic weapons because of their high rate of fire while affirming validity of the NFA).

Notably, as Plaintiff correctly observed in his briefing to the Court of Federal Claims, if the Akins Accelerator is not classified as a machinegun, it would “not fall under any federal regulatory scheme of any kind.” Plaintiff's Response to Motion to Dismiss, Akins v. United States, dkt. no. 08-136C (Ct. Fed. Cl. May 27, 2008). As with Plaintiff's own application of the theory of operation to the Ruger 10/22, the device could be adapted to outfit any semiautomatic weapon, including those with more powerful calibers, such as the “AK” type of semiautomatic weapon. This unhindered capability would be wholly inconsistent with the strict regulation of machineguns imposed by the NFA and the prohibition on post-1986 machineguns imposed by the GCA. See United States v. Golding, 332 F.3d 838, 840 (5th Cir. 2003) (discussing the “risk . . . presented by the inherently dangerous nature of machineguns,” as shown by “Congress's decision to regulate the possession and transfer of this specific type of firearm”); United States v. Haney, 264 F.3d 1161, 1168 (10th Cir. 2001) (“banning possession of post 1986 machine guns is an essential part of the federal scheme to regulate interstate commerce in dangerous weapons.”). Thus, ATF has a powerful interest in correctly interpreting the statute to close the loophole created by its earlier interpretation of the machinegun definition and preserve the integrity of the system regulating dangerous weapons.

Under similar circumstances in York v. Secretary of the Treasury, the Tenth Circuit weighed the three Eldridge factors, and concluded that although the plaintiff had an “important interest affected by the BATF decision,” he was “not deprived of his constitutional due process right” because of the strength of the government’s interests and the low risk of error. 774 F.2d 417 at 421. The York Court reached this conclusion despite the even stronger nature of the plaintiff’s interest: there, ATF’s decision “required him to recall and give refunds for guns already sold.” Id. Here, Plaintiff has not claimed such a burden, and the Court should therefore dismiss Plaintiff’s due process claim.¹¹

IV. Plaintiff’s Vagueness Challenge Should be Dismissed.

Finally, Plaintiff argues that the definition of machinegun found in 26 U.S.C. § 5845(b) “is unconstitutionally vague.”¹² Compl. ¶ 43. A statute is unconstitutionally vague “only where no standard of conduct is outlined at all; when no core of prohibited activity is defined.” Ford Motor Co. v. Texas Dep’t of Transp., 264 F.3d 493, 509 (5th Cir. 2001). On the other hand, a statute is not unconstitutionally vague unless it is “substantially incomprehensible,” and “men of common intelligence must necessarily guess at its meaning.” Cotton States Mut. Ins. Co. v.

¹¹ The York Court did observe that due process would require a hearing if he had argued the agency had made a mistake of fact. 774 F.2d at 421. To the extent that Plaintiff here is arguing that ATF has made a mistake of fact, Defendant notes that, unlike the plaintiff in York, he has already received a meaningful opportunity to present his case to the agency in written form.

¹² Although Plaintiff alleges that the statute is vague both “on its face” and “as applied to Plaintiff,” this Court need only review the statute as-applied, because “[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand.” United States v. Awan, 966 F.2d 1415, 1424 (quoting Maynard v. Cartwright, 486 U.S. 356 (1988)). See United States v. Jackson, 250 Fed. Appx. 926, 930 (11th Cir. 2007), cert. denied 2008 WL 1803622 (U.S. May 19, 2008) (same).

Anderson, 749 F.2d 663, 669 (11th Cir. 1984) (“substantially incomprehensible”); United States v. Wilson, 175 Fed. Appx. 294, 297 (11th Cir. 2006), cert. denied, 127 S. Ct. 225 (2006) (“men of common intelligence . . .”). Plaintiffs’ own allegations support the well-established precedent that 26 U.S.C. § 5845(b), although permitting multiple interpretations, does not fall to this level of incomprehensibility.

Plaintiff’s own actions suggest that the statute gave him fair notice that Akins Accelerators might well fall within the prohibited standard of conduct. Mr. Akins sufficiently understood the section 5845(b) definition to submit the device to FTB for classification. (Compl. at Ex. B, Compl. at Ex. C.). His concern was not a mere formality; after receiving the November 13, 2003 letter, he followed up with a telephone call and a subsequent letter seeking confirmation. Indeed, even after receiving ATF’s January 29, 2004 letter restating its earlier opinion, Mr. Akins so thoroughly recognized the likely application of the statute to his device that when he began to offer the device for sale, he used ATF’s original opinion as a marketing tool. See, e.g., R. 196 (noting that “especially important was that the Accelerator™ had received not one, but two approval letters from BATFE through their Firearms Technical Branch.”).

The fact that ATF’s initial classification was later deemed in error does not render the statute invalid for vagueness. Lawful statutes may be susceptible of multiple interpretations, and the mere fact that “there may be some ‘close cases’ or difficult decisions does not render a policy unconstitutionally vague.” Hills v. Scottsdale Unified School Dist. No. 48, 329 F.3d 1044, 1056 (9th Cir. 2003). See also Ford Motor Co. v. Texas Dep’t of Transp., 264 F.3d 493, 509 (5th Cir. 2001) (“A statute is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case.”); McConnell v. Federal Election

Commission, 251 F. Supp. 2d 176, 789 (D.D.C. 2003) ("if despite all of the mitigations, some slight potential for vagueness remains, 'uncertainty at the periphery' does not render a provision unconstitutionally vague.") (Opinion of Leon, J.), citing FEC v. National Right to Work Comm., 459 U.S. 197, 211 (1982).

Plaintiff is not the first to challenge 5845(b) as unconstitutionally vague, and every other court to review such a challenge has rejected it and affirmed the statute. See, e.g., United States v. Kelly, Nos. 05-4775, 06-1421, 2007 WL 2309761, at *5 (4th Cir. Aug. 14, 2007) (finding defendant's claim that section 5845(b) is unconstitutionally vague to be "without merit"), cert. pending, No. 07-776; United States v. Carter, 465 F.3d 658, 664 (6th Cir. 2006) ("The standard for determining vagueness in a criminal statute is 'if it defines an offense in such a way that ordinary people cannot understand what is prohibited or if it encourages arbitrary or discriminatory enforcement.' We find no such risk here."), cert. denied, 127 S. Ct. 2444 (2007); M-K Specialties Model M-14 Machinegun, 424 F. Supp. 2d at 872 ("Section 5845(b) provides fair notice to a person of ordinary intelligence that certain conduct is forbidden by statute."). This Court should interpret 5845(b) consistently with these examples and dismiss Plaintiff's vagueness challenge.

CONCLUSION

ATF acted reasonably in protecting the public from rapid-firing rifles by classifying Plaintiff's invention as a machinegun. Accordingly, the Court should dismiss Plaintiff's claims and grant judgment in favor of Defendant.

Dated: August 22, 2008

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM AKINS,)	
)	
Plaintiff,)	CIVIL ACTION FILE NO.
)	
v.)	8:08CV00988T-26TGW
)	
THE UNITED STATES)	
)	
Defendant.)	

STATEMENT OF DISPUTED FACTS¹

1. The purpose of the Akins Accelerator is to replace the stock of a host firearm, a semiautomatic rifle, and through controlled “bump firing,”² increase the rate of fire

¹ As Noted in Plaintiff’s accompanying Brief, Plaintiff cannot readily tell what facts are disputed because Defendant did not comply with the Court’s Scheduling Order requiring a moving party to confer with opposing counsel re agreement on facts. Likewise, Defendant did not file a separate Statement of Undisputed Facts. Plaintiff has endeavored not to state facts here that were stated somewhere in Defendant’s brief, but there may be some unintentional overlap.

² “Bump firing” is a term used to describe a method of achieving rapid firing of a semiautomatic firearm. The theory behind bump firing is that the recoil of the firearm forces the firearm to move rearward and disengage the trigger from the shooter’s trigger finger (thus resetting the trigger for another shot through the normal operation of the firearm), while forward tension is applied to the barrel or fore end of the firearm (such as by the left hand of a right-handed shooter), resulting in the firearm (and trigger) being forced forward again and causing the trigger to be “pulled” by the tension in the shooter’s finger. If done well, the result is that the firearm achieves firing rates equivalent to those of fully automatic weapons. The crucial aspects of bump firing are 1) the shooter must maintain tension in his trigger finger (so that the forward motion of the firearm and trigger meet the resistance of the finger and cause another shot to fire), and 2) forward pressure on the barrel or fore end of the firearm (such as by the non-dominant hand) to counteract the rearward motion caused by the

of the semiautomatic rifle while maintaining aiming accuracy. Decl. of William Akins, ¶ 3.

2. Plaintiff was not concerned that the Akins Accelerator “would violate the Gun Control Act.” Plaintiff merely sought classification of the device to confirm his and his attorney’s opinions regarding the device. *Id.*, ¶ 4.
3. To understand the operation of the Akins Accelerator, one can consider a simple example. Assume a conventional semiautomatic rifle³ weighing about five pounds. The “trigger pull” (the amount of force needed to pull the trigger hard enough to fire the gun) is about two pounds. It is not difficult to imagine that a shooter could load such a rifle, point it at the ground with his finger inside the trigger guard, and “drop” the rifle on his finger, held rigid and motionless. The rifle’s own weight easily exceeds the trigger pull, so that the very act of dropping the rifle on the shooter’s finger would cause the rifle to fire. *Id.*, ¶ 5.
4. The recoil or “kick” of the rifle would cause the rifle to “jump” off the rigid finger of the shooter while the semiautomatic nature of the gun would ready it for another shot. After the recoil is overcome by gravity, the rifle would fall back down onto the shooter’s finger, causing another shot to fire. This process would result in the rifle “bouncing” on the shooter’s trigger finger and the rifle shooting randomly into the ground. The process would continue until the rifle exhausted its supply of

recoil.

³ A semiautomatic rifle is one that, when the rifle is fired, the spent shell casing ejects from the firing chamber and then a fresh, live round is loaded into the chamber for the next shot. The rifle will not fire a second time unless the trigger is released and pulled again, but no action on the part of the shooter is necessary other than

ammunition (or the shooter shot himself in the foot). This trivial example prepares the reader for an explanation of the Akins Accelerator. *Id.*, ¶ 6.

5. The Akins Accelerator works on the same principle as the bouncing rifle. The force of gravity is replaced with a spring, however, so that the rifle can be fired in any direction and not just at the ground⁴. In addition, two steel rods along which the rifle mechanism glides constrain the “bouncing” motion to straight line motion, so that the rifle can be aimed at a target rather than fired randomly. Finally, the Akins Accelerator features finger stops against which the finger can apply isometric pressure instead of trying to remain rigid and motionless in the air. The spring and steel rods are located in the stock, and not the unmodified host rifle. The host rifle is unmodified in any way. This overview of the Akins Accelerator should be kept in mind while reading the more detailed description that follows. *Id.*, ¶ 7.
6. The Akins Accelerator is a replacement stock for the host firearm.⁵ The factory stock is removed and the Akins Accelerator put on in its place.⁶ The barrel and firing mechanism of the factory Ruger 10/22 are mounted into the Akins Accelerator. The spring and steel rods described above are internal to the Akins Accelerator. In the finished assembly (Akins and Accelerator and Ruger 10/22 firing components

repeatedly pulling and releasing the trigger. Semiautomatic rifles are quite common and are perfectly legal to purchase and own for people not otherwise prohibited from owning firearms (e.g., convicted felons).

⁴ Remarkably, it is this spring, replacing gravity and allowing a rifle to be aimed at something other than the ground that Defendant has deemed to be a machine gun.

⁵ The production model of the Akins Accelerator was made for a single host firearm: the popular Ruger 10/22 semiautomatic .22 caliber rifle. The theory of operation, however, could be used in a variation adapted for virtually any semiautomatic firearm. For simplicity’s sake, the host firearm will be referred to as a Ruger 10/22.

⁶ The factory stock is a single piece that consists of the fore-end, held by the shooter’s non-dominant hand while shooting, and the butt-end which is placed against the shooter’s shoulder while firing.

together), the replacement stock remains stationary and the Ruger 10/22 portion (barrel, receiver, and trigger group) is allowed to reciprocate along the steel rods. The force of the recoil send the Ruger 10/22 rearward until the spring of the Akins Accelerator forces the Ruger 10/22 forward again. The result is that the Ruger 10/22 “bounces” in a reciprocating motion inside the Akins Accelerator in the same fashion as the factory rifle that “bounced” on the shooter’s finger. The other innovation on the Akins Accelerator is that it has finger stops for the trigger finger. When the assembly is fired, the trigger finger pulls the trigger rearward until the finger encounters the stops located slightly to the rear and on either side of the trigger. Thus, when the assembly is properly adjusted, the trigger finger can move rearward just far enough to fire the rifle before the finger is stopped by the finger stops. Then, as the rifle moves rearward (due to the recoil discussed above), the trigger “disappears” between the finger stops and moves inside a recess in the grip of the Akins Accelerator stock, losing contact with the trigger finger. The shooter thus can maintain tension against the finger stops, which counter the tendency of the finger to follow the trigger rearward. *Id.*, ¶ 8.

7. Finally, as the rifle moves forward again due to the forward tension supplied by the spring, the trigger re-engages the trigger finger. Because the shooter maintains rearward pressure in the trigger finger, the trigger is “pulled” again (actually pushed into the finger), and the rifle fires. To summarize, a properly adjusted assembly (Ruger 10/22 and Akins Accelerator) will bump fire rapidly while achieving higher accuracy than is possible with other means of bump firing. *Id.*, ¶ 9.

8. The Ruger 10/22 reciprocates approximately 5/8 of an inch in an Akins Accelerator. *Id.*, ¶ 10.
9. Plaintiff saw the market value in the Akins Accelerator, even though he knew it was not a machine gun because the trigger must be functioned for each and every shot fired. For his customers' concerns, he wanted to ensure that there was no question regarding its status as not regulated by the federal government. Plaintiff is not licensed to manufacture firearms, including machine guns, and ***had no interest in entering that industry***. Plaintiff obtained an opinion letter from a nationally-recognized firearms attorney that the Akins Accelerator was not a machine gun, or a firearm at all, subject to federal regulation. Having already established that the Akins Accelerator is not a machine gun, in March 2002, he forwarded this letter, along with a copy of his patent, to the Firearms Technology Branch ("FTB") of the U.S. Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), asking for a classification of the device.⁷ *Id.*, ¶ 11.
10. When FTB had not replied to his request 15 months later, Plaintiff sent a second, substantially similar request in June 2003. In July 2003, FTB responded to the first request, asking for a sample to test and inspect. Eleven days later, Plaintiff's business associate, Tom Bowers, sent a sample to FTB. In October 2003, FTB responded to Plaintiff's second request, asking for a sample to test and inspect. Because he already had submitted a sample, Plaintiff did not respond to the October letter. *Id.*, ¶ 12.

11. In November 2003, FTB responded to Mr. Bowers that it had inspected the sample and tested it on a host firearm.⁸ Although FTB said the sample did not operate as intended, FTB nonetheless concluded, “Our examination has determined that the submitted stock assembly does not constitute a machinegun as defined in the NFA [National Firearms Act].” *Id.*, ¶ 13.
12. The November letter left an ambiguity: was the device not a machine gun because it did not function properly, or was it not a machine gun even if it functioned as intended? To resolve all doubts, Mr. Bowers called FTB and later wrote (in January 2004) regarding this issue. FTB responded later that month with, “Our classification of the stock assembly was rendered despite the fact that the screws dislodged from the frame. The theory of operation was clear even though the rifle/stock assembly did not perform as intended. In conclusion, your prototype shoulder stock assembly does not constitute a “machinegun” as defined in the NFA.” *Id.*, ¶ 14.
13. Satisfied with legal advice and two letters from Defendant that the Akins Accelerator was not a machine gun, Plaintiff invested his life savings into moulds, manufacturing capabilities, and marketing necessary to go into commercial production and sale.⁹ *Id.*, ¶ 15.

⁷ FTB routinely classifies devices for anyone requesting a classification.

⁸ The sample provided was made for an SKS-type semiautomatic rifle. As noted above, however, the theory of operation can be applied to virtually any semiautomatic host firearm and is not dependent on the specific type of firearm.

⁹ At the time of production, the Akins Accelerator was manufactured and sold by a corporation, Akins Group, Inc. Plaintiff is the successor in interest to this dissolved corporation, so no distinction is made between actions taken by Plaintiff personally or by the corporation.

14. When Plaintiff ultimately entered the market with the Akins Accelerator in 2006, initial response to the product was enthusiastic. On his way to recovering his investment and turning a profit, Plaintiff's success was destined to be short-lived. *Id.*, ¶ 16.
15. On October 31, 2006, ATF lawyer Ficaretta began trying to schedule a meeting "to discuss the classification" of the Akins Accelerator. At some point after this, an undated internal ATF memo says, "*The marketed device was radically different from the prototype* that was previously submitted. On further review and test fire, FTB determined that the operating principle was that of a machinegun." (Emphasis supplied). Doc. 19-3, p. 58; Doc. 19-4, p. 7.
16. On November 22, 2006, FTB sent Plaintiff a letter advising him that the Akins Accelerator had been classified as a machine gun. Contrary to the recent internal memo, the letter said, "*[T]he theory of operation of the prototype and the Akins Accelerator is the same.*" (Emphasis supplied). In the letter, ATF equated "function of the trigger" with "pull of the trigger." At no time prior to the November 22, 2006 letter, had Defendant given Plaintiff any notice or other indication it was revisiting the classification of the Akins Accelerator. Doc. 19-4, pp. 8-10.
17. On December 13, 2006, ATF issued a rulemaking, ATF Rul. 2006-2, declaring a device exactly meeting the description of the Akins Accelerator to be a machine gun. The rulemaking also equated "function of the trigger" with "pull of the trigger." ATF did not publish a notice of proposed rulemaking or seek comments pursuant to 5 U.S.C. § 553. Doc. 19-4, pp. 17-19.

18. On February 6, 2007, Plaintiff's counsel wrote ATF asking that it reconsider its ruling. The letter informed ATF that it had evidence of errors on ATF's part. Subsequently, Plaintiff's counsel made multiple requests for a hearing on the subject. ATF ultimately denied reconsideration and declined to hold a hearing. Doc. 19-4, pp. 26-39.
19. ATF determined that the spring was the part that made the Akins Accelerator a machine gun. Thus, it required Plaintiff to remove the springs from his inventory of Akins Accelerators, as well as those from his personally-owned Akins Accelerators. Plaintiff likewise was required to provide ATF with a customer list, and ATF required purchasers of Akins Accelerators to remove the springs. All removed springs were seized by ATF. Now classified as machine guns, there no longer is a market for Akins Accelerators. Plaintiff was forced to close down his company and cease production and sales, leaving him in financial ruin. Akins Decl., ¶ 17.
20. In an undated internal memo apparently written after the events described above, FTB Assistant Chief Richard Vasquez distinguished the Akins Accelerator from other devices because the shooter, he said, only has to have a single "initial conscious effort to pull the trigger." (Emphasis in original). He went on to say the "firearm continues to fire without interruption until a second, *conscious* releasing of the trigger stops the firing sequence." (Emphasis supplied). In the same memo, Mr. Vasquez retreated from the public position of the ATF by saying, "[I]t is FTB's opinion that 'function' is the best description and does not limit ATF to a narrow definition such as 'pull only.'" Doc. 19-4, pp. 57-59.

Dated September 4, 2008

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM AKINS,)	
)	
Plaintiff,)	CIVIL ACTION FILE NO.
)	
v.)	8:08CV00988T-26TGW
)	
THE UNITED STATES)	
)	
Defendant.)	

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO
DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT¹**

Introduction

This case is about mistreatment of a citizen by a government agency that admittedly predetermined, in consultation with its attorneys, the outcome it wanted *before* doing any testing, inspection, or evaluation. It then went about building its "legal case" to support its *predetermined* conclusion. In the process (or lack of process), the agency ignored the law, ignored the Constitution, and now ignores the orders of this Court, all without regard to the rights of citizens.

Defendant seeks dismissal for failure to state a claim, or in the alternative, summary judgment. As will be shown below, Defendant has not even come close to meeting its burden for a

¹ Defendant filed its motion in the alternative where the two are mutually exclusive. A Rule 12(b)(6) motion to dismiss cannot rely on matters outside the complaint. Defendant attached 328 pages to its motion and has manually filed additional materials. Defendant's arguments are hopelessly intertwined with references to these materials. Given that Defendant relies on these materials in its motion, it is frivolous for Defendant to characterize the motion as one to dismiss under Rule 12(b)(6). This motion must, therefore, be treated as one for summary judgment. Fed. R. Civ. P. 12(d). Plaintiff also notes that Defendant made no attempt to comply with this Court's Scheduling Order pertaining to motions for summary judgment [Doc. 18]. In particular, Defendant did not contact Plaintiff "for the purpose of narrowing the factual issues in dispute." Because it cannot be said that "the parties are in full agreement as to the undisputed facts," Defendant was required to "file a separate 'Statement of Undisputed Facts,' which Defendant failed to do. Plaintiff is filing a separate Statement of Disputed Facts as required by the Court's scheduling order, but Plaintiff cannot know with much degree of certainty that *all* facts in Plaintiff's statement truly are disputed (although clearly some are). It is apparent that Defendant filed its Motion in the alternative for the dual purpose of 1) avoiding having to file an answer by frivolously styling the Motion as one for dismissal, while 2) actually seeking summary judgment by relying on hundreds

motion on either ground, and the Motion must therefore be denied.

Argument

I. The Complaint States a Claim for Which Relief Can be Granted

When considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must assume as true all allegations in the Complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The case should be dismissed only if no relief could be granted under any set of facts that could be proved consistent with the allegations. *Mesocap Ind. Ltd. V. Torm Lines*, 194 F.3d 1342, 1343 (11th Cir 1999).

In the instant case, Plaintiff alleges that the Akins Accelerator does not “automatically” (or any other way) cause more than one shot to be fired with a single function of the trigger. He further alleges that he relied on ATF’s initial determination that the Akins Accelerator is not a machine gun. Furthermore, facts Plaintiff can prove consistent with the allegations in the Complaint are that 1) FTB’s Chief *pre-determined* the Akins Accelerator to be a machine gun without inspection, testing, or evaluation; 2) ATF failed to publish a notice of proposed rulemaking and seek comments; 3) ATF failed to hold a hearing and provide Plaintiff an opportunity to participate in an adjudicatory process; and 4) ATF has established a pattern of erratic and conflicting decisions.

These facts are sufficient to establish that Plaintiff may be entitled to relief. Defendant clearly denied Plaintiff Due Process and acted arbitrarily and capriciously.

More importantly, however, a court may not look to matters outside the pleadings when ruling on a Rule 12(b)(6) motion. Defendant has interspersed its arguments with citations to its record, to the point that it is impossible to consider any of Defendant’s arguments as being only related to a motion to dismiss. In short, Defendant’s Motion in reality only is one for summary

of pages of documents and not having to adhere to the formalities of a motion for summary judgment.

judgment. Plaintiff will not burden the Court with a repetition of his arguments in the alternative. Instead, he presents his arguments all in one place below.

II. There is a Genuine Issue of Material Fact

A motion for summary judgment cannot be granted unless there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All inferences must be drawn from the evidence in the light most favorable to the non-movant. *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir 1989).

It is clear that there are significant material facts at issue. Overshadowing all other facts is the issue of whether the Akins Accelerator enables firing more than one shot with a single function of the trigger. Defendant claims that it does and Plaintiff claims that it does not. This most material of all facts must be resolved before this case can be decided. Likewise, it appears that Defendant is not in agreement with Plaintiff that the Akins Accelerator is a device that assists bump firing. Because Defendant has ruled that bump firing is not a machine gun, a determination of whether the Akins Accelerator is a bump firing assisting device would go towards whether ATF acted arbitrarily and capriciously toward Plaintiff.

Presumably Defendant is not in agreement that Defendant had actual bias and prejudice towards Plaintiff when making its decision, another fact Plaintiff asserts (by referencing Defendant's own record. The existence of actual bias and prejudice is important in evaluating whether Defendant violated Plaintiff's Due Process rights.

Finally, Plaintiff also alleges, and Defendant presumably denies, that the Akins Accelerator does not operate "automatically," as that term is used in the statute.

III. Defendant is not Entitled to Judgment as a Matter of Law

The Record is Incomplete

Plaintiff observes that what Defendant calls a “record” appears to be a rag-tag compilation of 328 pages of documents that relate in some way to this case. They are numbered sequentially, but they are not in chronological order, indicating that this “record” was compiled hastily after the fact for filing in this Court (a fact further evidenced by the inordinate length of time it took for the agency to file the record). While there are few standards controlling an agency’s compilation of an administrative record, common sense dictates that some level of organization and understandability are required. Many documents in the record give no indication of the date, the author, or the person responsible for submitting it into the record. *See, e.g.* Doc. 19-4, p. 7. Moreover, 107 pages of the record have unexplained redactions on them, and 49 pages were omitted altogether (again without explanation).

[I]n making its review, the Court must have the whole record on which the agency acted.... This is so, because, in its review, the Court is to engage in a substantial inquiry into the reasonableness of the agency action and as a part of that inquiry it must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment since it is arbitrary and capricious for an agency not to take into account all relevant factors in making its determination.

Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir 1973). In the instant case, aside from Defendant’s failure to give Plaintiff a meaningful opportunity to participate in the process, Defendant has redacted large portions of the record. The Court cannot take into account the contents of these large redacted portions, so the Court cannot analyze the actions of Defendant.

Defendant’s Record Does Not Enable the Court to Review the Proceedings

Remarkable by its absence from the record is what one would have thought would be the cornerstone: a report from an unbiased ATF scientist who inspected, tested, and evaluated the Akins Accelerator using standard methodologies that can be duplicated to produce consistent results, perhaps with video documentation. The record contains no report at all. No where in the 328 pages

of materials and two video files is there anything even remotely resembling such a report or documentation. Instead, the conclusion that the Akins Accelerator is a machine gun seems to be based on nothing more than the *ipse dixit* conclusion that the Akins Accelerator is a machine gun. What is most remarkable is that ATF put video tests of five devices *besides* the Akins Accelerator into the record, but it did not video record whatever tests it performed (if it actually performed any tests) on the Akins Accelerator.

This court routinely defers to administrative agencies on matters relating to their areas of technical expertise. We do not, however, simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment. In order to survive judicial review in a case arising under § 706(2)(A), an agency action must be supported by reasoned decision making. Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope and authority, are not supported by the reasons that the agencies adduce.... We therefore owe no deference to ATFE's purported expertise because we cannot discern it."

Tripoli Rocketry Association, Inc. v. B.A.T.F.E., 437 F.3d 75, 76 (D.C. Cir 2006). "The agency has never provided a clear and coherent explanation for its classification.... ATFE has never articulated the standards that guided its analysis." *Id.* At 81. In the instant case, ATF (the same ATFE referred to in *Tripoli Rocketry*) has not articulated the standards for classifying firearms and has not provided a record from which the Court can discern any expertise on the part of the agency.

Defendant Committed Multiple Violations of the Administrative Procedures Act

At no point in its Motion does Defendant attempt to characterize its actions within the framework of the Administrative Procedures Act, 5 U.S.C. § 500 *et. seq.* ("APA"). That is, Defendant does not identify its "process" in this case as a rulemaking under § 553 or an adjudication under § 554. Although the text of the descriptions of these frameworks can be confusing, they can be summarized as: when an agency acts like a court, it is an adjudication. *N.L.R.B. v. A.P.W.*

Products Co., 316 F.2d 899 (1963). When an agency acts like a legislative body, it is a rulemaking. *Id.* In the instant case, Defendant acted like both a court (in determining the Akins Accelerator to be a machine gun) and a legislative body (in issuing a rule regarding devices like the Akins Accelerator). Thus, both § 553 and § 554 are implicated.

Under § 553(b), Defendant was required to provide a notice of proposed rule making via publication in the Federal Register, unless persons subject to the proposed rule are named (in which case they must be personally served or otherwise receive actual notice). While the final rule did not name Plaintiffs, it is undisputed that the final rule describes the Akins Accelerator with great specificity. Nothing in the record indicates Defendants published a notice in the Federal Register, but Plaintiff asserts that such a publication would have been insufficient anyway, given that the ruling made so narrowly applies to Plaintiff's patented invention. Plaintiff should have received actual notice of the proposed rule making so obviously aimed at his patent.

The only potentially applicable exception to this requirement is the "good cause" exception, where notice and publication may be dispensed with for good cause based upon a finding that notice and publication are impracticable, unnecessary or contrary to the public interest. No such finding is in the record. Even if there were such a finding, "the various exceptions to the notice and comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of New Jersey v. United States Environmental Protection Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). The rule is therefore invalid.

Finally, any rulemaking that is intended to have the force and effect of law must conform to the APA. *Chrysler Corp. v. Brown*, 44 U.S. 281, 303 (1979). Defendant obviously intended for its rulemaking to be binding on the nation, declaring that anyone who possessed an Akins Accelerator

possessed a machine gun that must conform to the law. Ultimately, Defendant seized the springs from Akins Accelerators, relying on its ruling. Thus, Defendant was obligated to provide notice and an “opportunity to participate in the rule making through submission of written data, views, or arguments.” 5 U.S.C. § 553(c). Defendant failed in its obligation.

Defendant now claims that Plaintiff’s receipt of Defendant’s *post hoc decision* and Plaintiff’s subsequent request for reconsideration “constitute the meaningful opportunity to be heard to which Plaintiff is entitled.” Doc. 19-1, p. 18. Defendant cites no authority for the proposition that § 553’s notice requirement is satisfied by announcing to the world *after the fact* what an agency has decided. Nor does Defendant cite any authority for the proposition that a party’s *sua sponte* request for reconsideration satisfies the opportunity to be heard requirement. There is no such authority.

Such authority, if it existed, would undermine the whole purpose of § 553. If an agency expects anyone to know of its rules, the rules will be published at some point. Theoretically, anyone can write an agency a letter at any time asking for reconsideration. If telling the world what the agency has decided and receiving mail are all that the APA requires, then the APA means nothing at all.

Defendant’s decision and declaration that Plaintiff’s invention is a machine gun are an adjudication. In coming to its decision, Defendant acted like a court. The result was specific to Plaintiff (and ultimately Plaintiff’s customers). It resulted in sanctions being imposed (as defined in § 551) in that property was confiscated (the springs from the Akins Accelerators). Under § 554, Defendant was obligated to give Plaintiff an opportunity for the submission and consideration of facts, arguments, offers of settlement, and a hearing and decision on notice when the matter was not resolved by consent. It is undisputed that Plaintiff received none of that. Plaintiff had no knowledge

that Defendant even was considering the matter until after a decision was made.

Plaintiff is Entitled to a Hearing as a Matter of Constitutional Due Process

Even if a hearing was not required under the APA (and one was), Plaintiff was entitled to a hearing on the merits as a matter of constitutional due process. Under *York v. Secretary of the Treasury*, 774 F.2d 417, 421 (10th Cir 1985), the court ruled that a person disputing the classification of a device as a machine gun on factual grounds is **constitutionally** entitled to a hearing on the merits. Plaintiff alleged in his Complaint, consistent with his position, that Defendant's decision was factually wrong. He is, therefore, entitled to a hearing on the matter.

Defendant Showed Prejudice and Actual Bias Against Plaintiff

It is clear from the record that ATF determined *a priori* that the commercial production Akins Accelerator was a machine gun, without even examining or testing it, and then set about looking for facts to support its conclusion. Doc. 19-3, p. 24. That is, ATF pre-judged the device before it ever opened its investigation.

[D]ue process requires a neutral and detached judge in the first instance.... That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation... which might lead him not to hold the balance nice, clear and true.

Concrete Pipe & Products v. Construction Laborers and Pension Trust, 508 U.S. 602, 617 (1993).

In the instant case, it is apparent from Defendant's own record that Mr. Nixon, the chief of the branch that re-classified the Akins Accelerator, had his thumb on the balance when he requested the investigation and kept it there while his branch made its decision ***before it ever inspected, tested, or evaluated*** the device.

On August 16, 2006, Mr. Nixon wrote an internal email saying:

Two companies are manufacturing machineguns.... The firearms are using the

motion of the weapon to move the finger back and forth. FTB has always evaluated these devices as machine guns. One of the manufacturers sent us a sample that did not function. We classified it as nothing. The manufacturer then changed the device and made it function and is now selling it on the internet.... I have been talking to James Vann and Teresa Ficaretta [two ATF lawyers]. ***We feel that ATF needs to put a stop to the sales ASAP. In order to make a legal case, FTB needs to evaluate these machineguns.***

(Emphasis supplied). The subject heading in Mr. Nixon's email was "Illegal machine guns." Doc. 19-3, p. 24. In that email, Mr. Nixon included an email from Daniel Pinckney, of the National Firearms Act Branch of the ATF, which said, "I guess by the current definition of a machine gun, it technically isn't one, but it sure has a pretty quick rate of fire."

Mr. Nixon called the Akins Accelerator an "illegal machine gun" and then directed his staff to buy one and test it to "build a legal case." Soon, ATF employees across the country were calling it a machine gun. Doc. 19-3, pp. 24-33. ATF said, "We evaluated the device and conferred with counsel (9/8/06) and determined it to be a machine gun." Doc. 19-4, p. 3. Shockingly, ATF evaluated the device and conferred with counsel ***two weeks before*** it ordered the Akins Accelerator from Plaintiff on September 22, 2006 [Doc. 19-3, pp. 54-55], and ***33 days before*** it sent the Akins Accelerator to FTB for examination. [Doc. 19-3, p. 54].

Defendant Acted Arbitrarily and Capriciously

Even if ATF afforded Plaintiff the statutory and constitutional due process to which he was entitled, ATF acted arbitrarily, capriciously, and came to factually incorrect conclusions. When the existing statutory definition of a machine gun did not quite fit the Akins Accelerator, ATF changed the definition in multiple ways to make it easier to reach the result it wanted. It changed the words "single function of the trigger" to "single pull of the trigger." Doc. 19-4, pp. 5, 9, 18.

This was necessary because ATF must concede that the trigger of the Ruger 10/22 has to

move backward to fire the gun, forward to reset, and backward again in order to fire a subsequent shot. Arguably, however, the trigger is only “pulled” one time (for the first shot) and is then “pushed” against the trigger finger for subsequent shots. It is somewhat pedantic to distinguish between “pushing” and “pulling” of a device, when the difference between the two rests merely on the perspective of an observer. Nonetheless, by drawing this distinction, ATF can say with a semblance of a straight face that more than one shot is fired for a single “pull” of the trigger.

Of course, ATF does not want to constrain itself to a “single pull of the trigger” for future devices (that might have a push button trigger), so it has moved back to “single function of the trigger” (the actual words of the statute) now that “single pull of the trigger” has served its purpose. Doc. 19-4, p. 61; Doc. 19-5, p. 1. Even within its own brief, Defendant cannot decide if “function” means “pull,” or if it also means “act,” “push,” or “event.”

Seeking support for its “pull” instead of “function” analysis, Defendant cites a Supreme Court case where “pull” was used interchangeably with “function.” *See, e.g., Staples v. United States*, 511 U.S. 600, 603 n. 1 (1994). The problem with Defendant’s reliance on such cases is that the only trigger function of interest in *Staples* was the “pull.” There was no discussion of “pushing” or any other function of the trigger, so there was no need to make any other distinction.

Clearly, where other functions are significant, “pull” cannot be used synonymously with “function.” For example, there is no doubt that a device that uses an electric motor to pull a trigger repeatedly when the electric circuit is closed is a machine gun. The electric switch is deemed in such cases to be the “trigger.” *See, e.g., United States v. Fleischli*, 305 F.3d 643 (7th Cir 2002). If “function” meant just “pull,” it would not take much imagination to activate such a device by an electric “push” button. In such a case, the trigger never would be “pulled” and the device could not

possibly fit this cramped definition of machine gun.

Moreover, ATF has never classified so-called “trigger release” firearms, where the firearm fires once when the trigger is pulled, and again when the trigger released, as machine guns. This flies in the face of the “function” means only “pull” claim, for in those cases the weapon fires twice with a single pull of the trigger (i.e., the trigger only gets “pulled” once, but the gun fires twice).

Moving from the sublime to the ridiculous, Defendant calls the movement of the trigger on the Ruger 10/22 to be “vibration” against the shooter’s finger, without citation to the record. Doc. 19-1, p. 14. Lest there be any mistake, the trigger on the Ruger 10/22 moves in exactly the same way (forward and backward and the same distance) when installed in an Akins Accelerator as it does in the factory stock. There is no “vibration” of the trigger, as that term is normally used. The trigger moves its full distance both forward and backward. Indeed, Defendant’s own video recording [Doc. 19, Exh. G] shows Defendant not testing certain other devices on a Ruger 10/22 because the trigger could not move forward far enough after the rifle fired to reset. “Vibration” of the trigger is insufficient for repeat firing of a Ruger 10/22. The trigger must move its complete cycle. When the Ruger 10/22 is mounted in the Akins Accelerator, the Ruger 10/22 reciprocates a distance of about 5/8 inch, hardly what one would call a mere “vibration.”

Defendant concludes, without support or citation to the record, that Plaintiff’s use of “function” is so “narrow” as to require each “vibration” to be a separate function. It is Defendant, not Plaintiff, that seeks to narrow the definition of “function” to just the initial pull of the trigger. Defendant refuses to consider all remaining (and necessary) movements of the trigger to be functions. The Ruger 10/22 cannot and will not fire a second shot unless the trigger is allowed to move fully forward and reset after a shot. If, as Defendant suggests now for the first time (and

without support from the record), the trigger merely “vibrated,” the firearm would fire only once.

ATF introduced, also for the first time in this case, the concept of “conscious” effort on the part of the shooter to function the trigger. Doc. 19-4, p. 59. This was necessary because, again, ATF must concede that the trigger travels rearward and forward again for every shot fired. To get around this inconvenient truth, ATF decided that the effort of the shooter’s finger against the trigger must be “conscious.”

The difficulty with the “consciousness” concept is two-fold. First, the fact that ATF created the concept just for the Akins Accelerator makes it suspect (especially in light of the bias shown by ATF officials towards the Akins Accelerator). Second, this concept is inherently subjective and not susceptible to scientific testing (By what standard can consciousness of performing a function be determined?).

In addition, FTB assistant Chief Vasquez claims anecdotally to have fired the Akins Accelerator/Ruger 10/22 while keeping his finger on the trigger. Doc. 19-5, p. 1. Supposing *arguendo* that this is true, Mr. Vasquez is claiming that his finger followed the trigger back and forth on its approximately 5/8-inch journey at a rate of 600-800 times a minute. Unfortunately (for it would be amazing to see), Mr. Vasquez did not submit a video into the record of his moving his finger at hummingbird speed. Supposing, again *arguendo*, that Mr. Vasquez really accomplished this feat, he does not claim to have been possessed by a demon at the time. He must, therefore, have “consciously” moved his finger for each and every shot. While the spring in the Akins Accelerator stock would move the Ruger 10/22 (including the trigger) forward, only Mr. Vasquez’s finger could move it back again to fire. In the hands of Mr. Vasquez, the Akins Accelerator cannot be a machine gun, because he is able to pull the trigger “consciously” for each shot.

The forgoing example from Defendant's own record merely illustrates the utter hopelessness of introducing a subjective factor (conscious activity) into the statutory definition of a machine gun that contains no such factor. A device is machine gun in everyone's hands, or it is not a machine gun in anyone's hands.

Defendant also ignores the word "automatically" in the statute. In order to be a machine gun, a device must shoot "***automatically*** more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). [emphasis supplied]. It is clear from Defendant's actions and brief that Defendant applies no meaning to the word "automatically." Defendant concentrates on "more than one shot" and "single function (or push, or pull, or act, or event) of the trigger."

The word "automatically" does have a meaning and its meaning is significant. The *Staples* court defined "automatically" as used in 26 U.S.C. § 5845(b) to "refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire ***until its trigger is released*** or the ammunition is exhausted." 511 U.S. at 602. [emphasis supplied].

Defendant's ignoring the word "automatically" undermines its entire defense. There is nothing in the record that indicates the trigger of the Ruger 10/22 mounted on an Akins Accelerator will "automatically continue to fire ***until its trigger is released***" because the trigger loses contact with the trigger finger every time the rifle fires (except in the extraordinary case of Mr. Vasquez, who consciously pulls the trigger several hundred times per minute). The trigger, therefore, can not be released, because it is not being held in position in the first place (i.e., there is nothing from which to "release" it). It cycles for every shot of the rifle.

Statutes should be interpreted to avoid making any word surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“We are thus reluctant to treat statutory terms as surplusage in any setting”). By ignoring the word “automatically,” Defendant has rendered it surplusage. When the word is considered in the statute with the definition supplied by the Supreme Court, it is clear the Akins Accelerator cannot be a machine gun.

Defendant is Not Entitled to Deference

“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987). In the instant case, Defendant did a complete about face on the very same question.

FTB essentially declared the Akins Accelerator to be a machine gun by *ipse dixit*, when it previously had determined that it is not a machine gun.

A court reviewing an *ipse dixit* outcome that seems inconsistent with proffered precedent is left to attempt to discern for itself which factual differences might have been determinative, without guidance from the agency, and to assess whether making such distinctions controlling is rational or arbitrary, again without any agency explanation of why particular factors make a difference. The court really has no way of knowing if the rationale it discerns is in fact that of the agency, or one of the court’s own devise. Yet only the former can provide a legitimate basis for sustaining agency action.

Lemoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir 2004). Without a rational explanation for the different treatment of the same device, this Court is unable to sustain Defendant’s actions.

Defendant claims its change in policy was due to two factors: 1) The Akins Accelerator commercially produced was intended for a Ruger 10/22, while the sample was for an SKS-type rifle; and 2) the production model was accompanied by advertising claiming rates of fire of 650 rounds per minute. These factors are irrelevant.

Defendant's concern about the "dangerousness" of the Akins Accelerator is not a legitimate factor. Defendant is interpreting a criminal statute and cannot make that statute more inclusive because of Defendant's fear. Even so, Defendant's fear of the "dangerousness" of the device should be lessened, not heightened, by the fact that the production model was built for a .22 caliber rifle rather than the world's premier military assault rifle caliber: 7.62 mm.² It is disingenuous for Defendant to imply that it would have preferred that the production model stay at this more powerful caliber, unless Defendant is prepared to say the identical device built for an SKS rifle is acceptable. Moreover, the Supreme Court has considered, and rejected, a concept of "dangerousness" as a measure of whether a person knew a particular device was a machine gun. *Staples v. United States*, 511 U.S. 600, 618 (1994) (noting that all guns are "dangerous" and half of all U.S. households contain them, so a person would not equate dangerousness of a gun with illicit behavior in owning one).

Even more disturbing, however, is Defendant's emphasis on the advertised rate of fire of the Akins Accelerator. First, there is not now, nor has there ever been, a rate-of-fire standard for determining if a device is a machine gun. Congress easily could have made such a test, and it arguably would be much simpler to apply such a test. Again, this argument of Defendant's, not applied to any other device, is another way of saying the Akins Accelerator works. The whole idea of the theory of operation is to increase the rate of fire.

Interestingly, Defendant does not discuss the rate of fire of any other device, be it machine gun or not. Several devices not classified as machine guns by FTB, such as the BMF Activator, also reportedly fire several hundred rounds per minute on a Ruger 10/22. In short, rate-of-fire is not only

² In case the Court is not aware, this is the caliber of the ubiquitous AK-47.

not determinative of classifying a device as a machine gun, it is not even a factor. If it were, any firearm in the hands of Mr. Vasquez of the FTB would be a machine gun, because he has the ability to pull the trigger several hundred times per minute. In addition, Defendant's video does not show Defendant attempting to see how fast the other tested devices could fire. If rate of fire were a factor, which it is not, Defendant would have to try to maximize rate of fire of other devices in order to make a useful comparison.

In approving the sample, FTB acknowledge the theory of operation and now concedes that the production model had the same theory of operation. Surely FTB, what must be the most technologically savvy governmental firearms agency in the world, was capable then of calculating how fast a given semiautomatic rifle would cycle and fire again when mounted on an Akins Accelerator. For this agency to express surprise now at high rates of fire in a device whose theory of operation it well understood when tested originally is disingenuous.

Defendant also claims to have reversed course because of "technological innovation." While this sounds intriguing, it is a hollow claim. Defendant points not to a single technological innovation that brought about its fickle behavior. The production Akins Accelerator was the same as the sample provided, it was just built to exacting commercial production standards.

ATF's real concern with the Akins Accelerator is that it works. When FTB tested the sample and it failed to work, FTB dismissed it as junk. The better-built production model caught FTB off-guard, and FTB looked for any excuse it could find to shut Plaintiff down.

Defendant all but concedes [Doc. 19, p. 21, n. 10] that the Akins Accelerator does not fit within the four corners of the statutory definition of a machine gun, calling it a "device cleverly designed to escape regulation." Defendant continues by boldly asserting without support that

Defendant's concept of public safety triumphs over the law and Plaintiff's "cleverness." That comment sums up the problem very neatly. Defendant, not wanting to be constrained with the technicalities of the law, prefers the standard of, "I know a machine gun when I see one." Defendant's position is what makes its application of law unconstitutional, as discussed below in Section IV.

Finally, ATF's rulemaking, promulgated in violation of the APA's notice and comment requirements, cannot stand. The only remaining determinations from ATF are opinions contained in letters, which are not entitled to deference. *Springfield, Inc. v. Buckles*, 116 F.Supp.2d 85 (D.D.C. 2000).

Defendant's Theory Makes a Plain Ruger 10/22 a Machine Gun

Ruger 10/22s are available in a variety of configurations, but models generally weigh between 4 and 5 pounds, according to Ruger's web site at www.ruger.com. Ruger does not appear to publish specifications for the 10/22's "trigger pull," the amount of force necessary to apply to the trigger to fire the gun, but several after-market manufacturers sell replacement 10/22 triggers that have trigger pulls ranging from a few ounces to about two pounds. A plain (i.e., not outfitted with an Akins Accelerator) Ruger 10/22 thus can be made to "bounce" on a shooter's trigger finger, as described in the Statement of Disputed Facts.

The same can be said for a large variety of rifles, especially higher caliber rifles that tend to be heavier yet have similar trigger pulls. In essence, ATF's "consciousness" standard could be applied to make virtually all semiautomatic firearms machine guns, because they all can be bump fired or "weight fired" without the shooter "consciously" pulling the trigger for each shot.

Plaintiff Relied on Defendant's Original Classification

Plaintiff relied to his detriment on Defendant's original classification. Without warning,

Defendant reversed itself and shut Plaintiff down in an arbitrary and capricious, if not malicious, manner.

Defendant claims incorrectly that Plaintiff was in the “firearms industry,” implying that Plaintiff consciously entered a regulated industry. This is not the case. Plaintiff scrupulously avoided becoming a manufacturer of firearms. He asked FTB to classify his device to make sure there would be no doubt. This was a prudent course of action, considering that FTB once classified a *shoestring* as a machine gun. Letter from FTB Chief Nixon, September 30, 2004. If Defendant had classified the Akins Accelerator as a machine gun in the first instance, Plaintiff never would have begun production at all (assuming any appeals were not resolved in Plaintiff’s favor). Plaintiff entered the firearms *accessory* industry, which is completely unregulated (at least at the federal level).

IV. Defendant’s Application of the Definition of Machine Gun is Unconstitutional

As noted above, Defendant prefers the standard of “I know a machine gun when I see one.” Depending on the circumstances, Defendant interprets “function” to mean “push,” “pull,” “action,” or sometimes “function.” Defendant applies a (non-existent in the statute) standard of rate of fire if it suits Defendant to do so. If all else fails, Defendant does not even attempt to fit within the statute and just says “public interest” prevails.

Defendant loses sight of the fact that Defendant is interpreting a criminal statute with severe penalties for violations. “It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.” *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999). When the agency responsible for primarily interpreting the statute applies such flimsy, fluid, and inconsistent standards, it is

impossible for the required notice to be made. In this case, Plaintiff had no way of knowing if his invention was to be evaluated on a basis of “push” or “function,” or on a basis of rate of fire, or on a basis of “dangerousness,” or on a basis of “consciousness,” or on a basis of “public interest” (or even that his device was being evaluated at all). The “standard” applied by Defendant is no standard and any standard that results in the result it seeks.

Defendant dismisses as “clever” Plaintiff’s attempts at *complying* with the criminal law. Criminal laws must be strictly construed against the government, with all doubts and ambiguities resolved in favor of non-criminality. *United States v. Bass*, 404 U.S. 336 (1971) *superseded on other grounds by congressional act*. Instead, Defendant astonishingly asserts that a “public interest” standard applies in determining what behavior is criminal and what is not. Defendant apparently missed the memo, now nearly 200 years old, that there are no federal common law crimes. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Moreover, only Congress can act to include conduct inadvertently omitted in a statute, no matter how salutary the purpose. *Viereck v. United States*, 318 U.S. 236, 243-245 (1943).

Congress laid out the boundaries of what constitutes a machine gun. ATF has no power to enlarge the boundaries in the “public interest.” If ATF believes the statutory definition of machine gun to be inadequate to protect the public interest, it may attempt to rectify the perceived inadequacy by bringing it to Congress’ attention. In the meanwhile, a device that does not fit the statutory definition of a machine gun is not a machine gun, and the degree of cleverness necessary to conjure up the device is irrelevant.

Defendant attempts to evade a finding of vagueness as applied to Plaintiff by citing cases where the same statute was not determined to be vague on its face or and as applied to others. An

as-applied challenge to the constitutionality of a statute cannot be resolved by looking to the results of facial challenges and challenges to other applications. To do so undermines the whole point of an as-applied challenge. Defendant does not cite to any case where it determined a device not to be a machine gun, then, applying different standards invented for that device only, changed its mind and determined that it was a machine gun. If there were such a case, it might have bearing. The cases cited by Defendant do not.

Conclusion

Defendant has failed to meet its burden for a motion to dismiss for failure to state a claim and for a motion for summary judgment. Plaintiff has stated a valid claim, and Defendant improperly refers the Court to matters outside the Complaint, requiring the conversion of a motion to dismiss to one for summary judgment.

As for a motion for summary judgment, there is a genuine issue of material fact. In addition, Defendant is not entitled to judgment as a matter of law because it is clear from the record and facts that Defendant deprived Plaintiff of statutory and constitutional due process and was factually incorrect in its conclusion that the Akins Accelerator is a machine gun.

For the foregoing reasons, Defendant's motion must be denied.

Dated September 5, 2008

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CERTIFICATE OF SERVICE

I certify that on September 4, 2008, I filed the foregoing PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT, together with a STATEMENT OF DISPUTE FACTS, DECLARATION OF WILLIAM AKINS, and LETTER FROM FTB CHIEF NIXON DATED SEPTEMBER 30, 2004 via the CMS/ECF system, which automatically will send a copy via email to:

Eris Soskin, Esq.
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/s/ John R. Monroe
John R. Monroe
Attorney for Plaintiff